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SYMPOSIUM

Programmatic Purpose, Subjective Intent, and Objective Intent: What is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?

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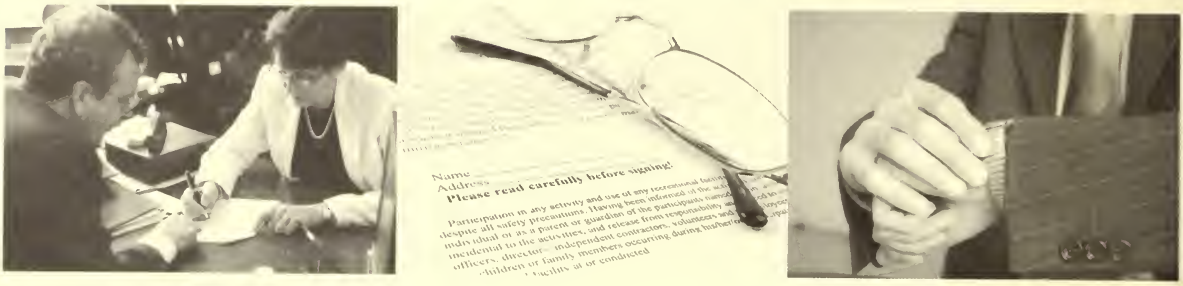

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INTRODUCTION
2006 FOURTH AMENDMENT SYMPOSIUM

PROGRAMMATIC PURPOSE, SUBJECTIVE INTENT, AND OBJECTIVE INTENT: WHAT IS THE PROPER ROLE OF "PURPOSE" ANALYSIS TO MEASURE THE REASONABLENESS OF A SEARCH OR SEIZURE?

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal landscape is constantly changing as a result of new technology and court decisions. The *Initiative* promotes awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

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[*] Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law.

[1] The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the U.S. Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. The Center archives videos of the presentations and copies of the articles from all of its Fourth Amendment symposia on its website, www.ncjrl.org.

A central pillar of the *Initiative* is annual symposiums on important search and seizure topics. On March 24, 2006, the Center hosted its fifth symposium on the Fourth Amendment, entitled *Programmatic Purpose, Subjective Intent, and Objective Intent: What is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?* The symposium coincided with the second day of a conference entitled *The Fourth Amendment: Contemporary Issues for Appellate Judges*, sponsored by the Center in cooperation with the National Judicial College, which was attended by approximately 30 appellate judges from as many states. They were joined for the symposium by 110 other attendees, while another 105 persons observed the symposium via the Internet.

This symposium addressed a central question about the reasonableness of a search or seizure: how relevant is the government agent's intent in measuring the propriety of that intrusion? This was not a conference about racial profiling.[2] One could argue, as many have, that racial profiling or pretextual actions that are motivated by race have resulted from the United States Supreme Court's eschewing an analysis of subjective intent. That may be a consequence of the Court's approach–and consequences are important. However, this conference was more concerned with structure: what

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[2] *See* Symposium, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure,* 73 MISS. L.J. 365 (2003) (featuring articles by Professors A. Morgan Cloud, David A. Harris, Tracey Maclin, and George C. Thomas, III).

should be the proper role of governmental intent in assessing Fourth Amendment reasonableness?

There is no easy answer to that question, especially if one considers the Supreme Court decisions addressing it. On the level of individual encounters of the police and citizens, one of the main principles of Fourth Amendment analysis for many years has been the measurement of a police officer's intent by examining the objective aspects of the encounter and not by inquiry into the officer's actual, subjective intent.[3] The Court has asked whether the actions are objectively justified based on probable cause or articulable suspicion of criminal activity known to the police officer; there is no examination of the actual motivations of the officer. Thus, for example, in *Whren,* a stop for a traffic offense was valid even though the police officers making it were seeking to investigate possible drug-related criminality.[4] Similarly, in *Atwater*, the arrest for not wearing a seat belt was considered valid, even though arguably motivated by a desire to harass the driver.[5] As another example, in *Robinson*, the Court found that a search incident to arrest was valid, even though the officer performing the search was not in fear for his safety.[6]

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[3] *See, e.g.,* Whren v. United States, 517 U.S. 806, 813-14 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers' actual motivations); Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (holding inquiry into subjective intent inappropriate); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted") (citing United States v. Mendenhall, 446 U.S. 544, 554 n.6 (1980)); Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (holding Fourth Amendment violation is objective inquiry and does not depend on the officer's state of mind); Scott v. United States, 436 U.S. 128, 138 (1978) (examining officers' actions and not his state of mind); United States v. Robinson, 414 U.S. 218, 236 (1973) (finding that for search incident to arrest, it does not matter that officer did not subjectively fear suspect or believe that the suspect might be armed).

[4] *Whren*, 517 U.S. at 813-14.

[5] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding reasonableness inquiry provides no substantive limitation on the ability of the police to arrest for minor offenses that are based on probable cause to arrest).

[6] United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search

Despite the many Supreme Court opinions rejecting an inquiry into subjective intent, numerous lower courts persist in using it. Illustrative is *Brigham City v. Stuart*,[7] where police officers responded to a house based on a complaint of a loud party. Upon arriving at the scene, they observed, through the window on a screen door, four adults in the kitchen restraining a juvenile. The juvenile broke free at one point and hit an adult in the face. As the adults continued to attempt to restrain the juvenile, the police entered the house. The Supreme Court took the case to resolve a split in the lower courts on the role of subjective intent in the application of the emergency doctrine. Two federal appeals courts and six state supreme courts had found no role for subjective intent and believed that the sole measure of reasonableness was whether a reasonable police officer would have believed there was an emergency. On the other hand, three federal appeals courts and thirteen state supreme courts had based the reasonableness of an entry on whether the officers were actually motivated to render aid. Resolving that issue, the Court in *Brigham City* unanimously rejected inquiry into subjective intent.[8]

On the other hand, in justifying departures from the individualized suspicion or warrant preference models, the Court has often relied on the premise that the governmental intrusion was not made to enforce a criminal law but was for some other purpose.[9] Yet, this non-criminal purpose analysis has been at least blurred in other cases.[10] The Court, in an at-

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incident to arrest was an exception to the warrant requirement and, given its historical pedigree, "reasonable" within the meaning of the Fourth Amendment, requiring no additional justification).

[7] 126 S. Ct. 1943 (2006).

[8] *Id.* at 1948.

[9] *See generally* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness,* 2004 UTAH L. REV. 977 (discussing the various ways in which the Court measures reasonableness).

[10] *See, e.g.,* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (permitting use of roadblocks to enforce the criminal law prohibition against drunk driving); New York v. Burger, 482 U.S. 691, 712-13 (1987) (permitting suspicionless search of an automobile junkyard pursuant to a statute regulating

tempt to distinguish between similar suspicionless intrusions, has recently relied on the "programmatic purpose" of the intrusion, which looks not to the subjective intent of the individual officer, but to the purpose of the higher ups who designed the program.[11] Thus, for roadblocks, which are suspicionless stops with most–if not all–of the same objective characteristics, the Court has reached different results based on differing motivations. In *Edmond,* where the roadblock was used to investigate drug crimes, and hence the primary purpose was characterized as advancing crime control, the stop was impermissible.[12] In *Lidster,* where the roadblock was used to solicit information from citizens concerning a hit and run accident at that location, the stop was pronounced valid.[13] In *Sitz,* where a roadblock was used to detect drunk drivers, the Court found that the primary purpose was to promote highway safety and, hence, the stop was reasonable.[14]

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vehicle dismantlers and observing that a state may enforce its criminal law goals through the regulatory process).

[11] City of Indianapolis v. Edmond, 531 U.S. 32, 45-46 (2000); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 81-86 (2001) (distinguishing between ultimate goal and immediate purpose for search and concluding that close examination of the immediate purpose of drug testing of pregnant patients is "indistinguishable from the general interest in crime control" and not a special need).

[12] 531 U.S. at 42. The *Edmond* Court asserted that, although subjective intentions play no role in ordinary probable cause analysis, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 45-46. The Court emphasized that the purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id.* at 48. Although recognizing "the challenges inherent in a purpose inquiry," the Court maintained that lower courts could "sift[] abusive governmental conduct from that which is lawful" and that "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Id.* at 46-47.

[13] Illinois v. Lidster, 540 U.S. 419, 421 (2004) (upholding roadblock to seek information about recent crime in area).

[14] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (balancing "the State's interest in preventing drunken driving, the extent to which [the checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon [stopped] motorists" in upholding the intrusion).

The complexity of Supreme Court jurisprudence is further illustrated by the sometimes expressed concern with subterfuge; thus, an inventory search of a vehicle cannot be used as a pretext for an exploratory search.[15] As a final example, in national security cases, Congress and the courts sometimes focus on actual intent, with the permissibility of identical actions turning on whether the primary purpose or a purpose of the search is for national security or for the investigation of ordinary crimes.[16]

Do all of these parts really fit together? Is the present structure workable? Is it consistent with the underlying purpose of the Fourth Amendment? Is there a better structure?[17]

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[15] Colorado v. Bertine, 479 U.S. 367, 371 (1987); South Dakota v. Opperman, 428 U.S. 364, 370-71 (1976). The search must be pursuant to a routine administrative policy and not part of an investigation. *Bertine*, 479 U.S. at 376-77 (holding police may search canister inside pouch contained in backpack inside locked vehicle either at roadside or at impoundment lot); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (holding police may search arrestee's bag and containers therein, rather than sealing the bag for storage pending owner's release); *cf.* Michigan v. Thomas, 458 U.S. 259, 261-62 (1982) (when officer found contraband during inventory search, search of remainder of vehicle permissible based on probable cause to believe it contained additional contraband). The function of an inventory search is to protect the owner's property, to protect the police against false claims for stolen or lost property, and to protect the police and others from potential danger. *Lafayette*, 462 U.S. at 646-47; *Opperman*, 428 U.S. at 369. Although the Court "purports to require standardized criteria to guide the officer's discretion," the Court actually permits officers conducting inventory searches a great deal of discretion. Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 543-44 (2002).

[16] Debra Livingston, Professor, Columbia Law Sch., Presentation at Fourth Amendment Symposium at the University of Mississippi School of Law: Purpose Analysis and the Wall Between the Law Enforcement and Intelligence Communities (Mar. 24, 2006) (examining the role of purpose analysis in building up the wall between the law enforcement and intelligence communities). After that presentation, Professor Livingston was nominated for the United States Court of Appeals for the Second Circuit and understandably withdrew from contributing an article.

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[17] I have previously discussed my views on this. *See* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness,* 2004 UTAH L. REV. 977. Purpose analysis, whether measured at the programmatic level or by plumbing the mind of individual officers, is a problematic approach. *Id.* at 1024-26. For example, nothing in the *Edmond* Court's analysis would prevent Indianapolis from simply re-labeling its program and conducting the same screening for drugs as an incident of an otherwise permissible checkpoint, see 531 U.S. at 47 n.2 (asserting that the Court "need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics"), which is to say that the distinction between a criminal law enforcement purpose and other purposes is illusory. *See* Camara v. Mun. Court of San Francisco, 387 U.S. 523, 531 (1967) (recognizing that most regulatory laws are enforced by criminal process); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public,* 1989 SUP. CT. REV. 87, 89, 114-16 (rejecting distinction between regulatory enforcement and criminal law enforcement as "chimerical and irrelevant"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 411 (1988) ("[T]he penal-regulatory distinction misses [the] point that whatever the inspection's purpose, [it] still invades the individual's privacy."). Even if viable, such a distinction is unwise: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara,* 387 U.S. at 530. Intrusions may be performed to determine whether a building meets fire safety codes, whether a motorist is intoxicated, whether automobile parts are stolen, or whether a child's welfare is being maintained. *See* Sodal v. Cook County, 506 U.S. 56, 69 (1992) ("What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all."). The fact that the intruder may be there for a relatively benign purpose should carry no weight in assessing the reasonableness of the governmental intrusion. Nor does it matter whether the intent is subjective to the individual officer or whether the purpose inquiry is made at the programmatic level. Indeed, such a distinction is particularly ironic in light of the search and seizure practices that motivated the Framers of the Amendment: suspicionless intrusions approved of at the "programmatic level," that is, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government. While I agree with the view that reasonableness must be assessed based on the facts known to the governmental agent, in assessing those facts the Court should employ objective criteria, such as probable cause or articulable suspicion or, where applicable, a warrant. In situations where *necessity* mandates that the government intrude in the absence of such criteria, the Court should employ a test that utilizes fixed, neutral, and objective criteria to measure reasonableness. *See* Clancy, *supra*, at 1026-41.

These are but a few of the questions that one might consider.

The Center believes that the symposium–and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at that event–significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center, and I personally, wish to thank the leading legal scholars who participated.

In *The Reasonable Policeman: Police Intent in Criminal Procedure,* Professor Craig Bradley examines police mental states across a variety of situations, considers how the Court has dealt with those situations, and seeks to determine if a better approach is available. Professor Bradley observes that "issues concerning police intent are present in virtually every Fourth Amendment case"[18] and "there is no such thing as a purely objective Fourth Amendment inquiry."[19] A significant portion of his article focuses on probable-cause based and reasonable-suspicion based situations and he carefully examines the state of mind required for such intrusions. For example, for probable-cause based actions, he observes that it must still be established that the facts were known to the officer. In such situations, he maintains, the appropriate inquiry is whether the police have a reasonable and good faith belief in the facts that objectively constituted probable cause. Similarly, he finds a role for an examination of the officer's subjective state of mind when probable cause is in issue and when the police make mistakes. More generally, he asserts that when the police have probable cause or reasonable suspicion, it is necessary that they "believe" in the truth of the evidence. He comes out differently, however, for protective actions by the police, such as frisks. In those situations, Professor Bradley maintains, police protection weighs heavily and he has "no difficulty allowing an automatic frisk, even if the police do not believe the suspect to be armed, at least when the case involves a crime where it is objectively reasonable to suspect that a weapon might be involved."[20]

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[18] Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 372 (2006).

[19] *Id.*

The second article, by Professor George Dix, entitled *Subjective "Intent" as a Component of Fourth Amendment Reasonableness,* offers a comprehensive examination of the Court's "general hostility to subjective components of Fourth Amendment law."[21] He views the Court's treatment in its opinions of the role of subjective intent as "minimal" and therefore examines the briefs of the parties in many of the important cases to examine considerations "not fully reflected in the Court's explanations."[22] After making that survey, Professor Dix concludes that there has been a "complete lack" of a "careful argument in support of a subjective approach."[23] He further observes that "the Court's decisions in toto reflect an implicit recognition that purely objective standards for reasonableness are awkward to formulate and discuss"[24] and that the Court often uses terms that "assume both subjective and objective components."[25] He believes that the Court's discussions "leave [it] unclear how courts should approach [] so-called objective standards."[26] Professor Dix then proposes possible roles for officers' awareness in a variety of situations and begins by observing that the analysis of reasonableness must be based on facts known to the officer. He then examines a series of ways in which subjective intent could be utilized and the possible justifications for such approaches. Professor Dix believes that the "strongest case for broadly defined subjective components"[27] in measuring reasonableness is the recognition that the Fourth Amendment "is essentially a regulatory regime"[28] and that it should "identify and provide a disincentive for unacceptable law enforcement conduct but not penalize such conduct where doing so would not serve to prevent future misconduct."[29] Professor Dix believes that this requires consideration of the actor's state of mind. After examining the merits of several models on how best to formulate the reasonableness inquiry, he examines the costs of a partially subjective model, including Oregon's experience with doing so. On balance, Professor Dix concludes, Fourth Amendment standards should contain a subjective component.

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[20] *Id.* at 368.

[21] George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 375 (2006).

[22] *Id.* at 376.

[23] *Id.* at 442.

[24] *Id.* at 443.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 458.

In *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule,* Professor Andrew E. Taslitz focuses on one aspect of the debate over intent, offering an interesting perspective on the Court's treatment of the underpinnings of the good faith exception to the exclusionary rule. A central thesis is that the exclusionary rule, as interpreted by the Supreme Court, serves in part the "function of condemning the institutional *moral* culpability of the police."[30] Given that underlying rationale, the Court's focus on deterrence "seems incomplete."[31] Implicit in the Court's opinions on good faith, he finds, is an additional focus on "the moral culpability of the police and the expressive function of their conduct"[32] that is not identical with the traditional understanding of the goals of deterrence. When the Court first adopted the good faith exception, he asserts, the Court focused more on "the institutional aspects of police wrongdoing"[33] and "saw the institution of the police as akin to a separate legal person."[34] Professor Taslitz sees an analogy to principles of corporate liability, which he believes "sheds light on the Court's approach to good faith and suggests refinements"[35] to that doctrine. Corporate liability principles is a familiar area of the law where the "idea of distinctive personalities responsible for individual wrongful acts of those in their employ are reflective of a broader organizational moral culpability"[36] and, hence, offers lessons. By looking at the police departmental decisionmaking process in the same manner as one does in analyzing corporate liability, it can be determined if the officer's actions reflect the basic beliefs of the department. Acceptance of this analogy, Professor Taslitz maintains, "would lead to greater judicial intrusiveness into policing by creating stronger incentives for police departments to discourage the Fourth Amendment violations of individual officers"[37] but would also give the "police wide discretion in going about this task, and police compliance would give them a safe harbor for avoiding the shoals of the exclusionary rule."[38]

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[28] *Id.*

[29] *Id.*

[30] Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 485 (2006).

[31] *Id.* at 486.

[32] *Id.* at 488.

[33] *Id.* at 530.

[34] *Id.*

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[35] *Id.* at 486.
[36] *Id.* at 530.
[37] *Id.* at 489.
[38] *Id.*

THE REASONABLE POLICEMAN: POLICE INTENT IN CRIMINAL PROCEDURE

Craig M. Bradley[*]

Mental state, or mens rea, is at the heart of criminal law. The act of killing another person can range from the crime of first degree murder to an acquittal on the ground of self defense, depending entirely on the mental state of the accused. This is true even if the facts did not support self defense, as long as the defendant reasonably believed that they did.[1]

Criminal procedure, by contrast, is largely unconcerned with the mental state of the accused. Even notions of the suspect's "expectations of privacy" introduced in *Katz v. United States*[2] as the keystone of Fourth Amendment rights were quickly turned into expectations that "society is prepared to recognize as 'reasonable.'"[3] That is, whether certain police activity is a search or not does not depend primarily on whether the suspect has a subjective expectation of privacy but rather on what the expectations of a reasonable person would be, as defined by the Supreme Court.[4] Likewise, the voluntariness test as to confessions has been rejected in favor a set of rules for the police to follow.[5]

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[1] *See* MODEL PENAL CODE § 3.04 (Official Draft 1985).

[2] 389 U.S. 347 (1967).

[3] *Id.* at 361 (Harlan, J., concurring). *See* WAYNE R. LAFAVE ET AL, CRIMINAL PROCEDURE 129 (4th ed. 2004) (noting that the subjective approach was quickly abandoned).

[4] *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) ("[A subjective] expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable."). The Court does seem to agree, however, that such a subjective expectation is a necessary, albeit insufficient, condition for a police intrusion to be deemed a search. *Id.*

This is, in general, a sensible approach. Rules for police behavior should not usually depend on the often unascertainable state of mind of the suspect—but what about the state of mind of the police? Similar to its attitude toward the state of mind of the suspect, the Supreme Court has often suggested that the state of mind of the police is also irrelevant. That is, the validity of police actions depends not on their subjective intent, but upon the objective existence of facts constituting probable cause, reasonable suspicion, or, in other situations, how a reasonable policeman would think or act.

In *Whren v. United States*,[6] a unanimous Supreme Court rejected a claim that it was improper for narcotics police to arrest someone for a traffic offense, for which they had probable cause, when their true motive was to investigate possible drug trafficking, for which they lacked probable cause. The Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"[7]and boldly declared that "we [have] never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."[8]

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[5] Ultimately, of course, the voluntariness of a confession is still the test of its admissibility; however, since *Miranda v. Arizona*, 384 U.S. 436 (1966), went into effect, the Supreme Court, somewhat astonishingly, has *never* struck down a station-house confession as involuntary. *But cf. Arizona v Fulminante*, 499 U.S. 279 (1991) (invalidating as involuntary a confession given under duress to an undercover agent in a prison setting); *Mincey v. Arizona*, 437 U.S. 385 (1978) (invalidating as involuntary a confession given to a detective in a hospital); *Beecher v. Alabama*, 389 U.S. 35 (1967) (invalidating as involuntary a confession given under duress prior to *Miranda*).

Similarly, voluntariness is the test of a valid consent to search, but again, the Court has never struck down a consent as involuntary. *But cf. Florida v. Royer*, 460 U.S. 491 (1983) (holding a consent invalid *per se* when obtained during an illegal detention). *See* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005) (arguing that the voluntariness approach misses the point); Craig M. Bradley, *The Court's Curious Consent Doctrine*, TRIAL MAGAZINE, Oct. 2002, at 72 (criticizing both prongs of consent doctrine).

[6] 517 U.S. 806 (1996).

[7] *Id.* at 813. The Court acknowledged, however, that there are at least two situations in which police intent may be relevant: administrative inspections and inventory searches, which need not be based on probable cause and "must not be . . . ruse[s] for a general rummaging in order to discover incriminating evidence." *Id.* at 811 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)).

Whren, in turn, was based on *Scott v. United States*,[9] where the Court rejected the contention that wiretap evidence must be excluded because the agents conducting the tap had made no effort to minimize interception of non-relevant calls. The Court held that the agents had minimized.[10] Beyond that, though, the Court, while conceding that, had a violation occurred, the "official motives may play some part in determining whether application of the exclusionary rule is appropriate," the Court accepted the government's argument that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[11]

Recently, the objectivity holdings of *Scott* and *Whren* were reaffirmed by a unanimous Court in *Brigham City v. Stuart*.[12] However, less than a month later, in deciding whether certain witness statements were to be considered testimonial under the Sixth Amendment, the Court showed its confusion as to this issue by unanimously declaring that police purpose in obtaining the statements was of paramount importance.[13]

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[8] *Id.* at 812. What, never? Well, hardly ever. In *Jones v. United States*, 357 U.S. 493 (1958), a search was struck down because the police entered for the improper purpose of searching at night when the warrant specified a day search, even though they could have properly entered to arrest at night.

[9] 436 U.S. 128 (1978).

[10] *Id.* at 140-42.

[11] *Id.* at 136.

[12] 126 S. Ct. 1943 (2006). In *Stuart*, the Court held that it was irrelevant whether the police entered a house with the intent of defusing a fight or to arrest the occupants and find evidence since the police had an "objectively reasonable basis for believing" that prompt action was necessary to protect people against harm. *Id.* at 1945. Since they were justified in doing either, this was clearly correct. *Id.*

[13] *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objec-

Also, in *United States v. Leon*,[14] the Court insisted that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[15] In his classic article, *Perspectives on the Fourth Amendment*, Professor Anthony G. Amsterdam explained why:

> [S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.[16]

Professor Wayne LaFave agrees that disregarding police intent when police have probable cause, as the *Whren* Court did, is correct.[17] He insists, as to stops, frisks, arrests, and searches that the test "is *purely* objective and thus there is no requirement that an actual suspicion by the officer be shown."[18]

But before this "objectivity train" has completely left the station, I decline to be among those who are "all aboard."[19]

> tively indicate that there is no such ongoing emergency, and that the *primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). It is not clear that police purpose should matter here, so long as the questions appear aimed at defusing an emergency, which may have been what the Court meant.

[14] 468 U.S. 897 (1984).

[15] *Id.* at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

[16] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974) (footnotes omitted).

[17] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 134 (4th ed. 2004).

[18] *Id.* § 9.5(a), at 472.

[19] Also not aboard is Professor John Burkoff who, in the 1980s, wrote several articles urging that police intent was important and not precluded by the Su-

While police intent may be difficult to ascertain and easy to fabricate, there are numerous cases in which it is, or should be, the key to the outcome. First, police knowledge of the facts is a critical, and inherently subjective, component of probable cause. While "[s]ubjective intentions" may indeed "play no role in ordinary, probable-cause Fourth Amendment analysis" when the police are *right*, these intentions may be critical, in both civil suits and suppression hearings, when police have made a mistake.[20] Beyond this, even when police have objective probable cause or reasonable suspicion that criminal activity is occurring or has occurred, their subjective beliefs should bear on the validity of their actions in certain circumstances. Finally, there are a variety of other situations, including the execution of search warrants,[21] arrest warrants,[22] and the administrative and inventory searches acknowledged in *Whren*,[23] where police intent would appear to be relevant to the issue of the propriety or impropriety of the police behavior in question.

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preme Court's opinion in *United States v. Scott. See supra* notes 9-11 and accompanying text; *see generally* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) [hereinafter Burkoff, *Bad Faith Searches*]; John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REFORM 695 (1985) (responding to James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639 (1985)); John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. MERCY L. REV. 363 (1989). While these articles have been to a large extent superseded by the Supreme Court's 1996 decision in *Whren*, and while I do not agree with some of Professor Burkoff's analysis, I still give him credit for introducing insightful analysis of this difficult issue into the academic debate.

[20] Whren v. United States, 517 U.S. 806, 813 (1996).

[21] *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (holding that whether or not a "no-knock" entry is permissible depends, not simply on the nature of the crime, but on a "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime"). This appears to depend on the subjective impression of the police of the situation before them, as well as the reasonableness of those impressions, not merely what a hypothetical reasonable policeman might perceive the situation to be.

[22] *See* Payton v. New York, 445 U.S. 573, 603 (1980) (indicating that an arrest warrant can be executed in "a dwelling in which the suspect lives when there is reason to believe the suspect is within").

[23] *See supra* note 7 and accompanying text.

This article, while not disputing the holding of *Whren*, will examine the various contexts in which the mental state of the police is still at issue, consider how the courts have dealt with this issue, including the critical question of whether the reasonableness of the police behavior is a matter of objective or subjective analysis, and attempt to develop a consistent approach to the question of the relevance of police mental state in criminal procedure.

I. PROBABLE CAUSE

Consider first the most important Fourth Amendment concept, and the one declared in *Whren* to be divorced from the "[s]ubjective intentions"[24] of the police: probable cause. Probable cause is the prerequisite for most searches[25] and all arrests. The Court expanded upon *Whren* somewhat in the 2004 case of *Devenpeck v. Alford.*[26] In that case, the suspect, Alford, was arrested because the police believed he was taping them during a traffic stop and that this violated the state's Privacy Act.[27] The criminal case was dismissed at trial and Alford sued for unlawful arrest.[28] The Ninth Circuit overturned a verdict for the police, reasoning that the tape recording was not a crime in Washington state and that, although there was probable cause to arrest Alford for impersonating an officer, the crime was not "closely related" to the crime for which he was arrested and therefore could not justify the arrest.[29]

A unanimous Supreme Court per Justice Scalia reversed and declared the arrest proper: "[s]ubjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."[30] Just as bad motivation, or a policeman's belief that he lacks probable cause will not invalidate an arrest or search that is in fact based on probable cause,[31] the Supreme Court has made it clear, in *Beck v. Ohio*[32] for example, that in the absence of factual probable cause, the good faith of the arresting officer will not make a bad arrest or search good.[33]

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[24] 517 U.S. at 813.

[25] Exceptions include administrative and inventory searches, as well as frisks. There is a further group of police searches that are not considered by the Court to be searches under the Fourth Amendment at all. *See* California v. Greenwood, 486 U.S. 35, 40 (1988) (trash searches); Oliver v. United States, 466 U.S. 170, 176 (1984) (searches of "open fields").

[26] 543 U.S. 146 (2004).

[27] *Id.* at 149.

[28] *Id. at 150.*

[29] *Id.* at 152.

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough". . . . If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police.[34]

A. *Facts Known to the Officer*

However, even the objective question of probable cause contains, as the *Devenpeck* Court made clear, at least one issue that may require a probing of the policeman's mind: "facts *known* to the arresting officer."[35] In fact, the wording of the *Devenpeck* quotation is significant because it resolves some potential issues, albeit in dictum, and perhaps ill-advisedly. Consider the following scenario: police in a city decide to crack down on marijuana grown by city residents. Accordingly, two policemen scan apartment windows with binoculars, looking for marijuana plants growing there. Policeman A sees what he believes to be a marijuana plant growing in an apartment window. Policeman B looks and believes it not to be marijuana but says nothing. Policeman A then gets a search warrant, and accompanied by Policemen C and D, he enters the apartment. When they enter, they first discover that the plant in question is not a marijuana plant, though it might be mistaken for one at a casual glance; however, they discover a sawed-off shotgun lying on the floor. Policeman A arrests the occupant for possession of the shotgun.[36]

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[30] *Id.* at 154-55. It is not clear why the Court held the way it did since the closely related test applied by the court of appeals seemed to require an objective consideration of the two laws in question rather than an inquiry into the officer's subjective intent.

[31] Florida v. Royer, 460 U.S. 491, 507 (1983) (plurality opinion) ("[T]he fact that the officers did not believe there was probable cause . . . would not foreclose the State from justifying Royer's custody by proving probable cause . . . .").

[32] 379 U.S. 89 (1964).

[33] This is subject to the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984). *See* discussion *infra* Part I.D.

[34] *Beck*, 379 U.S. at 97 (citing Henry v. United States, 361 U.S. 98, 102 (1959)).

[35] *Devenpeck*, 543 U.S. at 152 (emphasis added). Likewise, the Court in *Stuart* held that probable cause requires an "objectively reasonable basis for believing" that an emergency is at hand. Stuart v. Brigham City, 126 S. Ct. 1943, 1948 (2006).

Since it was not known to the arresting (and searching) officers (with the exception of Policeman B) that the plant was something other than marijuana, this search would be legal, and since the entry was legal, the shotgun in plain view would be seizable, according to the quoted language in *Devenpeck*. Even if we expanded the *Devenpeck* dictum to include "known to all of the police involved in the case," as the Court has said we should,[37] or even "known to anyone in the police department,"[38] it is not clear that Policeman B's doubts would qualify. Probable cause, after all, just requires a "substantial basis"[39] for a "fair probability"[40] that the plant in question was marijuana. Arguably, there was a fair probability that this was marijuana despite B's belief. Even if B voiced his belief, there is still a 50/50 chance that A is right and this, according to the Court, is enough to constitute probable cause.[41] However, it is hard to say that the evidence was "known" to police when at least some of the officers had serious doubts. As will be discussed in more detail later, there can be no knowledge without belief. Therefore, in this situation, it should be held that there was no probable cause.

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[36] This may seem like an unlikely use of police time, but this actually occurred in my apartment building in Washington, D.C., when I was a prosecutor there, including the misidentification of the plant and the search warrant, but not the finding of the sawed-off shotgun.

[37] *See* United States v. Leon, 468 U.S. at 923 n.24 ("References to 'officer' throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.").

[38] *See* United States v. Giglio, 405 U.S. 150, 154 (1972) (holding that knowledge of a fact by one prosecutor in the office was attributable to all).

[39] Illinois v. Gates, 462 U.S. 213, 238 (1993).

[40] *Id.* (citing Jones v. United States, 362 U.S. 257, 271 (1960)).

What if, due to specialized training, the police involved *know* that this plant is not marijuana but also know that a reasonably well-trained officer could mistake it for that dreaded weed? They get a warrant anyway (because the apartment belongs to a person they suspect of other illicit activity, someone they want to harass, etc.). It is quite clear from *Devenpeck* that any evidence found must be suppressed, despite the objective existence of probable cause: the facts known to the officers did not support probable cause.[42] This result reinforces the conclusion in the previous paragraph since the only difference in the two cases is Policeman A's ignorance of the characteristics of the marijuana plant.

And what if the police did not know that the plant was something other than marijuana, but were reckless as to that fact? That is, using criminal law terminology, they "consciously disregarded a substantial and unjustifiable risk" that it was another kind of plant that they had heard about, but they had not familiarized themselves with the characteristics that distinguished it from marijuana? And what if they were negligent, mistaking it for marijuana when a reasonable policeman would not have? It is hard to say that it was "known" to the police that such a plant was marijuana when a reasonably well-trained officer would not have believed that it was. Only in the situation where the police had both a reasonable and a good faith belief that the plant was marijuana should the search be considered appropriate.[43]

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[41] *See* Maryland v. Pringle, 540 U.S. 366 (2003) (holding that a one in three chance was enough to satisfy probable cause).

[42] *See supra* notes 26-30 and accompanying text.

The Court has supported this result in *Franks v. Delaware*,[44] at least as to knowing and reckless mistakes: "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."[45]

However one comes out as to these factual scenarios; the subjective knowledge, recklessness (also a subjective concept), or negligence as to facts on the part of the police is certainly a legitimate subject for inquiry.

B. Probable Cause in Issue

Beyond the highly subjective question of what facts were known to the officers lies another common situation, unlike *Whren* where probable cause was conceded and *Beck* where its lack was conceded. That is where the existence of probable cause is at issue. As the passage from *Franks* quoted above suggests, where the existence of probable cause is in doubt, it is certainly appropriate to probe the police mental state, be it knowledge that the information is false, or recklessness or negligence as to its truthfulness, in determining the existence of that probable cause.

The Supreme Court has acknowledged that this is a permissible inquiry in cases where the credibility of the police in asserting probable cause is in issue. In *Scott v. United States*,[46] the Court observed that

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[43] *See infra* Part I.D.

[44] 438 U.S. 154 (1978).

[45] *Id.* at 165. However, as Professor Alschuler has pointed out, the *Franks* standard is almost impossible for a defendant to meet. Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309, 318 (1984). Professor Alschuler explained that in order to secure a hearing on the truthfulness of an affidavit, the defendant must first make "'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.'" *Id.* (quoting *Franks*, 438 U.S. at 155-56). But the defendant cannot make this showing without the hearing. *Id.* at 319. Therefore, "*Franks's* requirement of a substantial preliminary showing becomes an insurmountable 'Catch-22': A defense attorney cannot develop the facts until he secures a hearing, and he cannot secure a hearing until he develops the facts." *Id.* at 319.

> [w]e . . . have little doubt that as a practical matter the judge's assessment of the motive of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question.[47]

Thus, in the above marijuana search example, suppose that instead of a random examination of the windows of the apartment building, police actually were looking for some excuse to search a particular individual's apartment. They spot the same plant, have the same reactions, and discover the same non-marijuana plant upon entry. It is easier to accept the *Whren* reasoning when the police, as in *Whren*, were unquestionably right about probable cause.[48] But if the existence of probable cause is in issue, it is surely correct to require the trial court to consider their motive in assessing whether or not there was probable cause.

C. When Police Make Mistakes

The previous two subsections have dealt with the state of mind of the police in assessing whether there was factual probable cause and whether the police knew it. But, as *Scott* acknowledged, police intent is also relevant when "it has been determined that the Constitution was in fact violated."[49] While this statement was to become true in *United States v. Leon*,[50] six years after *Scott* was decided, more often the Court has used police (good) intent to declare that, what would otherwise appear to be a constitutional violation by the police, was not.

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[46] 436 U.S. 128 (1978).

[47] *Id.* at 139 n.13.

[48] *See supra* notes 6-8 and accompanying text. *But see* Burkoff, *Bad Faith Searches*, supra note 19, at 100-01 (stating that he would strike down a search when the police have a bad motive, even if they had objective probable cause, if they would have performed an illegal search regardless of having probable cause). I agree with *Whren* and Professor LaFave that such a search should be legal. *See supra* notes 17-18.

[49] 436 U.S. at 139 n.13. The *Scott* Court cited *United States v. Janis*, where evidence unconstitutionally seized by state police was held admissible in an IRS forfeiture proceeding, because such use was "outside the offending officer's zone of primary interest." 428 U.S. 433, 458 (1976). It also cited *United States v.*

In *Maryland v. Garrison*,[51] police obtained a search warrant to search the person of one McWebb and "the premises known as 2036 Park Avenue third floor apartment."[52] When the police got the warrant and conducted the search, "they reasonably believed that there was only one apartment on the premises described in the warrant."[53]

As it turned out, there were two third floor apartments and the police wandered into Garrison's and spotted contraband in plain view before they realized their mistake.[54] The Court declared that "if the officers *had known, or even if they should have known*, that there were two separate dwellings on the third floor," they should have obtained a more limited warrant.[55] Thus, a negligence standard was applied where the warrant was inadequate due to a good faith mistake by police. Although the Court described the police conduct as "objectively understandable and reasonable,"[56] the decision clearly hinges on "the mistaken belief that there was only one apartment on the third floor."[57] The Court's objective analysis does not even come into play until it recognizes a good faith, subjective, belief on the part of the police in the validity of their acts.

Under these circumstances, the Court held both that the warrant was not defective for lack of specificity and that the

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Ceccolini, 435 U.S. 268 (1978), where an illegal search turned up a live witness, and the Court refused to exclude such witness's testimony. Neither of these cases seems to have much to do with police intent, suggesting the elusiveness of this topic. A reference to civil suits against police would have been more to the point.

[50] 468 U.S. 897 (1984).

[51] 480 U.S. 79 (1987).

[52] *Id.* at 80 (citation omitted).

[53] *Id.*

[54] *Id.* At least that is what the majority concluded; however, not all of the justices agreed. *Id.* at 90 (Blackmun, J., dissenting) ("[The] mistake . . . was not reasonable under the circumstances.").

[55] *Id.* at 85 (majority opinion) (emphasis added).

[56] *Id.* at 88.

[57] *Id.* at 85.

execution of the warrant was acceptable: "[T]he Court has . . . recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."[58]

Likewise, in *Hill v. California*,[59] the police, with probable cause to arrest Hill, arrested Miller whom they found in Hill's apartment, believing him to be Hill.[60] They seized evidence that incriminated Hill during a search of the apartment incident to the arrest.[61] The Court, per Justice White, one of the principal proponents of the objective approach, found that the police had a reasonable good faith belief that the party arrested was Hill, and it adopted the holding of the California courts that "[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest."[62] The Court went on to note that "subjective good-faith belief"[63] alone would not justify the police conduct, but "on the record before us, the officers' mistake was understandable and the arrest a reasonable response to the situation."[64] Thus the outcome in *Hill* clearly depends on the fact that the officers acted in subjective good faith as well as reasonably (*i.e.*, non-negligently)—a combined subjective/objective test. It surely would not have been enough for the officers to have pointed to all of the reasons why a reasonable officer might have believed that Miller was Hill had they themselves not believed it.

Thus, if police in fact have probable cause, but make a reasonable (objective), good faith (subjective) mistake in either writing or executing the warrant (*Garrison*)[65] or in arresting the wrong person (*Hill*), I agree with the Court that the arrest or search should be valid. But this result hinges on an analysis of the officers' state of mind.

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[58] *Id.* at 87.

[59] 401 U.S. 797 (1971).

[60] *Id.* at 799.

[61] *Id.* at 799-800.

[62] *Id.* at 802 (alteration in original) (citation omitted). Clearly, the same result would have been obtained had they found evidence incriminating Miller.

[63] *Id* at 804.

[64] *Id.*

[65] *But see* Groh v. Ramirez, 540 U.S. 551 (2004) (holding that an obvious misstatement in a warrant as to the objects to be seized was not "reasonable").

D. The Good Faith Exception

Similar to *Garrison* and *Hill*, the subjective good faith of the police is also in play when they rely on a defective warrant, despite the Court's seeming stand to the contrary. In *United States v. Leon*,[66] the Court held that, where police have seized evidence pursuant to a search warrant, later found defective because it lacked probable cause, the evidence may nevertheless be admitted if the police had a "reasonable good-faith belief" in the validity of the warrant.[67] (This differs from the *Garrison/Hill* situation in which the Court found that the police actually had probable cause which, by definition, is sometimes wrong, and did not act unconstitutionally.) The *Leon* reasoning was that, since the exclusionary rule was designed to deter police mistakes and misbehavior, and since the mistake here was that of the magistrate who issued the warrant, not (just) the police, exclusion would not serve its deterrent purpose, as long as the police acted in reasonable good faith reliance on the warrant.[68]

Leon, under the same reasoning, was subsequently extended to mistakes by legislatures in drafting unconstitutional statutes on which police rely in good faith[69] and to mistakes by court personnel who enter incorrect information into a computer on which police rely in making an arrest.[70]

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[66] 468 U.S. 897 (1984).

[67] *Id.* at 909 (citation omitted).

[68] *Id.* at 919-20. Of course, the reasoning of *Leon* could also apply to searches and arrests without warrants. If the police act in the good faith belief that they have probable cause, or exigent circumstances, then what deterrent purpose can be served by excluding evidence? In criminal law, there is an ongoing debate about whether any acceptable purpose is achieved by punishing *negligent* behavior. Since a reasonable good faith belief by police is not even negligent, how can that be deterred by exclusion? Why should "the criminal go free because the constable blundered" at least when it is a reasonable good faith blunder? But presently, the Court has not been willing to go this far. *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983) (arguing, in anticipation of *Leon,* that this is why the deterrence rationale is an inadequate and unjustifiable basis for the exclusionary rule).

[69] Illinois v. Krull, 480 U.S. 340 (1987).

So the Court is willing to accept police assertions of good faith as to probable cause when there is objective evidence of a mistake by an independent[71] government actor. But what exactly is the state of mind of the police required by *Leon*? The term, "reasonable good-faith belief," seems to be both objective and subjective, as it was used in *Hill* and *Garrison*. That is, the policeman must subjectively believe in the validity of the warrant, and that belief must be objectively reasonable. But the Court strove mightily to explain that *Leon,* despite its repeated use of the apparently subjective term "good-faith," "eschew[s] inquiries into the subjective beliefs of law enforcement officers who seize evidence . . . . [O]ur good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[72]

It is clear, however, that this reasoning was largely to deflect criticism, written in advance of the *Leon* holding, that a good faith belief *alone* should not be sufficient to waive exclusionary sanctions.[73] That is, the Court was making it clear that it was not abandoning the *Beck* standard. The Court explicitly accepted that knowing or reckless misstatements as to the facts constituting probable cause in the affidavit could still be the basis for exclusion.[74]

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[70] Arizona v. Evans, 514 U.S. 1 (1995).

[71] Note Justice O'Connor's concurring opinion in *Evans,* joined by two others, that had this mistake been in the *police's* computers rather than the court's, she would have come out the other way. *Id.* at 17 (O'Connor, J., concurring).

[72] *Leon*, 468 U.S. at 922 n.23 (citations omitted). As subsequent discussions of civil suits will make clear, the Court is apparently also willing to consider claims that the police knew that the warrant was not based on probable cause, leaving several subjective issues open. *See* discussion *infra* Part I.E.

[73] In *Leon*, the Court quoted at length from Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412-13 (1977). *Id.* at 919 n.20. However, Israel clearly was arguing for an approach that was *both* objective and subjective.

[74] *Id.* at 923 (citing Franks v. Delaware, 438 U.S. 154 (1978)). Since a negligent mistake by the police would also be unreasonable by definition, this should also be an evidence-excluding error. *Id.*

Taking the Court at its (somewhat confusing) word, in terms of inquiry into the police's state of mind, *Leon's* rule about warrants is not substantially different from non-warrant cases. In neither case is the subjective belief of the police that they either met, or failed to meet, the *legal* standard of probable cause relevant.[75] The test in warrant cases is whether a reasonable officer would have believed in the warrant's validity. In non-warrant cases, the test is whether there was in fact probable cause.

In both cases, however, subjective awareness by police that the *facts* on which they are relying are, or may be, false, *is* relevant. If the police know that these facts are wrong, or are reckless or negligent as to their accuracy, then the evidence must be suppressed, as *Garrison* makes clear, regardless of the existence of a warrant. The magistrate, after all, is usually in no position to verify the facts stated in the affidavit. He simply decides whether the facts, as written, add up to probable cause.[76]

What about the execution of warrants? As appears in *Garrison*[77] and *Leon*,[78] when police exceed the scope of a warrant, their mental state should also be critical. That is, if the police negligently, recklessly, or knowingly exceed the scope of the warrant, then anything they find should be excluded. On the other hand, if the police exceed the scope of a warrant reasonably and in good faith, then the evidence should not be suppressed, as *Garrison* holds. But what if, though a reasonable policeman might have believed that a warrant to search the house for guns would have included looking in drawers, this policeman knows that the guns in question are shotguns that could not be in the drawers searched. This goes back to the original *Devenpeck* reference to the knowledge of the arresting or searching officer. As long as *he* knows that he is exceeding the scope of the warrant, it does not matter what a reasonable officer might think.

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[75] *But see* discussion of civil suits *infra* Part I.E (making it clear that if an officer "knew" that a warrant was legally defective, despite its appearance of validity, the evidence should also be suppressed and immunity from civil suit lost).

[76] *See* Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302 (1985) (explaining this problem in greater detail).

[77] *Garrison* applies its negligence standard to both the obtainment and execution of the warrant. *Compare* Maryland v. Garrison 480 U.S. 79, 85 (1987) ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."), *with Id.* at 86 ("If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment.").

[78] *Leon*, 468 U.S. at 919 n.19 ("Our discussion . . . assumes, of course, that the officers properly executed the warrant and searched only . . . for those objects that it was *reasonable to believe* were covered by the warrant.") (emphasis added).

E. Civil Suits

The law concerning civil suits against police and other public officials casts further light on the meaning of good faith. The Court has made it clear that the "objective" approach of *Leon* applies to civil suits as well as to the application of the exclusionary rule to defective search warrants,[79] so everything the Court has said about civil suits applies equally to criminal cases involving warrants.

In *Harlow v. Fitzgerald,*[80] the Court held that the prior mixed "objective and subjective" standard of good faith would be changed to a "purely objective" approach.[81] Thus government officials would be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[82] But it is clear that the Court is talking about an objective approach that eliminates a malice basis for the civil suit.[83] Still open for consideration was whether the officer knew or should have known that his conduct violated the law:

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[79] Malley v. Briggs, 475 U.S. 335 (1986). This conclusion was recently reaffirmed by the Court in *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004).

[80] 457 U.S. 800 (1982).

[81] *Id.* at 815, 819.

[82] *Id.* at 818.

[83] *Id.* at 816. Trial judges had often regarded this as a question of fact for the jury, requiring a trial. *Id.*

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be expected to "know" that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.[84]

As Justice Brennan elaborated in a concurring opinion:

> I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions even if he could not "reasonably have been expected" to know what he actually did know.[85]

Thus, in civil suits based on constitutional violations by the police, which use the same standards as those used for admissibility of evidence in *Leon*-type situations, the subjective knowledge and intent of the police is critical.

F. Police Beliefs

Even if the police have not made a mistake, and when they have objective probable cause or reasonable suspicion, is it necessary that they believe in the truth of that evidence? In my view, the answer is yes.

Of course this scenario will not arise very often. If police do not believe that someone is a criminal, they ordinarily will not arrest or stop him, despite the existence of objective probable cause or suspicion. But it can arise.[86] Suppose the police see a man who meets the description of the perpetrator of a series of robberies that had recently occurred in the same vicinity: "A white male, about 40 years old, about 5'10," wearing a blue knit cap and a long black trench coat." This would be probable cause to arrest.[87] However, one of the policemen recognizes the man as the principal drug wholesaler for the neighborhood (but the officers have no reason to believe he is currently carrying drugs). There is no way he would be out committing robberies, though the police do not actually know for a fact that he is not the robber. Is an arrest proper? I think not.

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[84] *Id.* at 818-19.

[85] *Id.* at 821 (Brennan, J., concurring) (citations omitted).

[86] *See, e.g.*, Ochana v. Flores, 199 F. Supp. 2d 817, 825 (N.D. Ill. 2002), *aff'd* 347 F.3d 266 (7th Cir. 2003) (holding that an "officer's subjective belief of probable cause" is important "in evaluating the [validity] of an arrest"); *see also* United States v. McCarty, 862 F.2d 143 (7th Cir. 1988).

It is not an empty exercise to require that police believe their objective evidence. Of course, if they had arrested this man, and found a stash of narcotics in his coat pocket, they would, no doubt, swear to their belief that he was a robber. But the police might well have said something during the arrest to indicate that they knew who the man was, or their knowledge might otherwise be established, and thus be forced to admit their underlying belief that he was not a robber. The courts may be tempted to extend *Whren* to this case, but it is not the same. Here the police had additional information about the suspect that brought the existence of probable cause into question. In effect, the police no longer "knew" that they had probable cause: the relevant question according to *Devenpeck.*

The notion that probable cause requires not only the existence of objective facts, but also that the police believe those facts, is as ancient as the concept of probable cause itself. (Justice Scalia take note). Probable cause was also called "probable cause of suspicion."[88] As Lord Hale stated, "They [warrants] are not to be granted without oath made before the ju[s]tice of a felony committed, and that the party complaining ha[s] probable cau[s]e to [s]u[s]pect they are in [s]uch a [h]ouse or place, and do [s]h[o]w his rea[s]ons of [s]uch [s]u[s]picion."[89] That is, the complainant himself had to hold the suspicion, as well as present objective reasons to support it.

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[87] Even readers in doubt would have to agree that probable cause exists if a red muffler and horn-rimmed glasses were added to the equation.

[88] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 703 (1999). "[The] common law required that arrests or search warrants had to be based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a particular person to be arrested or place to be searched." *Id.* Davies continues: "Thus, because Lasson's treatment of search warrants understated Hale's insistence on an allegation of felony-in-fact, it allowed readers to erroneously believe that common law permitted a search warrant to be issued on 'probable cause' alone." *Id.* at 704 n.447. An allegation of "felony-in-fact" would seem to require that the constable *believed* that there had been a felony

Landynski observed that "the standards of probable cause required by Hale applied equally to arrest and to search warrants."[90] He went on to note that Hale's views were adopted in the 1765 case of *Entick v. Carrington*,[91] which "exercised great influence on the subsequent course of search law in the United States as well as in England."[92]

Thus it appears that the term probable cause in the Fourth Amendment was intended to augment actual subjective suspicion on the part of the police, not to supplant it. The arguments presented above would apply equally when the police, with objective probable cause, had doubts that the offense was actually committed or that the property was in the place to be searched.

It might be thought that it is obvious that when the Supreme Court is talking about an objective test, everybody understands that the Court did not mean to exclude police disbelief in the guilt of the suspect. But this is not the case.

As discussed below, there is a conflict in the circuits on the issue of whether the police must really be suspicious in order to

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and that the suspect had committed it, not merely that a reasonable person could believe that based on the evidence. *See Id.*

[89] 2 SIR MATTHEW HALE, A HISTORY OF PLEAS OF THE CROWN 150 (new ed. 1800).

[90] JACOB LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 27 (1966).

[91] 19 Howell's State Trials 1029 (C.P. 1765).

[92] LANDYNSKI, *supra* note 90, at 29. Early Supreme Court pronouncements on the issue are equivocal, suggesting that the Court had not really focused on this particular question. *See* Stacy v. Emery 97 U.S. 642, 645 (1878) (quoting various sources including Justice Bushrod Washington in *Munns v. DeNemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9926)) (defining probable cause as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged").

have reasonable suspicion for a stop or frisk. Likewise, there is similar confusion about probable cause. Consider the following passage from LaFave:

> On one occasion at least the Supreme Court has stated the rule as being "that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony," which seems to call for a subjective belief. Similar dictum on this particular point is also to be found in some lower court decisions, such as that "actual facts creating an actual belief can alone give rise to probable cause." *But this is not the correct view.*[93]

While I am loathe to disagree with the nation's leading authority on the Fourth Amendment, both the history of the term probable cause, *Carroll*, *Beck*, and other Supreme Court cases suggest that a requirement of an actual belief is the correct view, and that LaFave has it wrong. LaFave discusses the case of *United States ex rel. Senk v. Brierley*[94] to bolster his view. *Brierley* held that:

> [T]he mere subjective conclusion of a police officer concerning the existence of probable cause is not binding on this court which must independently scrutinize the objective facts to determine the existence of probable cause. Moreover, since the courts have never hesitated to overrule an officer's determination of probable cause when none exists, consistency suggests that a court may also find probable cause in spite of an officer's judgment that none exists.[95]

This is very close to the reasoning of *Whren* and *Devenpeck* and, with LaFave's learned support, very likely how the Supreme Court would decide this issue. I disagree for the following reasons.

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[93] LAFAVE, *supra* note 17, § 3.2(b), at 36-37 (emphasis added) (quoting Carroll v. United States, 267 U.S. 132, 156-57 (1925); People v. Langston, 226 N.W.2d 686, 672 (1975)). In fact, as noted, *Beck* held the same thing, and *Beck* was quoted with approval in both *Terry* and *Leon*.

[94] 381 F. Supp. 447 (M.D. Pa. 1974); *aff'd mem.* 511 F.2d 1396 (3d Cir. 1975).

[95] *Id.* at 463 (citation omitted).

The consistency discussed by the *Brierely* court, and adopted by LaFave, is false. It is true, as *Leon* reiterated, that a policewoman's belief in *legal* probable cause is irrelevant (which is probably what *Brierely* is saying), whether or not factual probable cause exists. But this does not rule out a requirement that she must believe the *facts* that appear to constitute probable cause.

In most cases, these two concepts will be inseparable. A policewoman usually will believe that she has both factual and legal probable cause before she arrests or searches. But one can easily envision a situation where the two are separable. Suppose a policewoman receives information from an informant who has given her reliable information on one prior occasion. The policewoman believes the informant, but is under the impression that without two prior instances of reliable information, the information does not constitute probable cause. The trial court concludes, correctly in my view, that since she knows the identity of the informant and would know where to find him again if necessary, this was enough to constitute probable cause under *Illinois v. Gates*.[96] Under these circumstances, where the policewoman *believes* the information, plus there was enough to constitute factual probable cause, the evidence should be admitted. Her legal conclusions about probable cause are irrelevant.

By contrast, if the informant had given reliable information on two prior occasions (clearly enough for probable cause, even under the tougher regime of *Spinelli v. United States*,[97] prior to *Gates*) but the policewoman did not believe him in this case, an arrest or search based on this information should be disallowed. As Professor Amsterdam observed in the passage quoted earlier in this article, it will be difficult to get police to admit such doubts when they have in fact arrested a suspect or searched his premises.[98] But when the situation arises, as for example, where the policewoman who dealt with the informant admits that, despite her doubts as to the informant's story, her superior ordered her to seek a warrant, evidentiary suppression is the correct outcome.

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[96] 462 U.S. 213 (1983).

[97] 393 U.S. 410 (1969).

[98] *See supra* note 16.

Suppose further that an epistemologist was lurking in the police station and questioned the policewoman about the basis for her disbelief. If she said, "it was because he looked at me funny" or "from what I knew of the suspect, what he said could not be true," or any other reason, or even no particular reason,[99] the epistemologist would declare that "she did not know that the facts constituted probable cause," as *Devenpeck* requires. It is a fundamental principle of epistemology that "*Knowledge requires belief.*"[100]

In fact, I suspect that many of the courts that have insisted on an objective approach to probable cause might not disagree with the outcomes reached above. Instead, as the decisions cited by LaFave tend to illustrate, the courts, in declaring police subjective intent irrelevant, seem to be thinking of the first hypothetical–where the policeman has doubts about legal probable cause–and not the second, where he doubts the facts constituting probable cause.[101] But LaFave is quite adamant that the "test [for stops], as is the case with the legal standard for arrest, is *purely* objective and thus there is no requirement that an actual suspicion by the officer be shown" and he cites many cases that support his view.[102]

Another situation where the courts have rightly disregarded police intent, and which gave rise to Justice White's statement in the *Painten* case,[103] which he then quoted with approval in his majority opinion in *Leon*, is "unexecuted intent to act unlawfully."[104] In *Painten*, police went to an apartment with the intention to arrest and search the occupant whom they suspected of a crime, even though they lacked probable cause.[105] The police did not communicate this plan to the defendant, who was led to believe that they only wished to speak to him.[106] He asked them to wait a minute, closed the door, and tossed a paper bag onto the fire escape.[107] He then admitted the officers who in fact only asked him questions.[108] Meanwhile, another officer seized the bag from the fire escape, finding evidence.[109]

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[99] In the situation where there is no basis for her disbelief, my colleague Joe Hoffmann argues that, even though this policewoman lacked probable cause, the warrant or arrest should be valid because any reasonable policeman would have believed in this evidence. But he agrees with me that if there is *any* credible basis for the policewoman's disbelief, she cannot be said to "know" that probable cause exists. (These opinions were asserted in conversation with the author).

[100] Matthias Steup, *Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/archives/spr2006/entries/epistemology/#JTB (last visited October 7, 2006) (emphasis added).

[101] *E.g.*, United States v. Thomson, 354 F.3d 1197, 1202 (10th Cir. 2003).

[102] LAFAVE, *supra* note 17, § 9.5(a), at 472 (footnote omitted).

[103] *See* Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissent-

The court of appeals suppressed the evidence on the ground that what transpired after the knock was irrelevant because at the time of the knock the officers' purpose was to arrest the petitioner. Justice White, correctly in both my view and Professor LaFave's view, argued that such an unexecuted intent was irrelevant as long as what the police actually did was objectively justifiable. The Court majority subsequently adopted this view in *United States v. Hensley.*[110] But while this case has given rise to some of the Supreme Court's emphasis on objectivity, it is distinct from the situations discussed in this article where police intent is relevant. In *Painten*, the police only arrested and searched after they had obtained legitimate probable cause, and they believed in those facts.

In sum, when it comes to probable cause, the following mental states by the police continue to be at issue, notwithstanding the Court's repeated declarations of objective tests over the last twenty plus years:

1. Whether the police knew, or should have known,[111]

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ing).

[104] LAFAVE, *supra* note 17, § 1.4(b), at 116.

[105] *Painten,* 389 U.S. at 563-64 (White, J., dissenting). These are the facts according to Justice White's opinion dissenting from the Court's dismissal of the case.

[106] *Id.* at 563.

[107] *Id.*

[108] Id.

[109] *Id.*

[110] 469 U.S. 221 (1985).

[111] The should have known standard is negligence, which necessarily includes

that the facts they claim amounted to probable cause, whether in a warrant or not, were incorrect.

2. Whether the police knew, or should have known, that a warrant issued by a magistrate was legally insufficient, as to probable cause or particularity, if in fact it was insufficient.[112]

3. Whether police knew, or should have known, that they were exceeding the scope of a warrant.

4. Whether the police subjectively believe that a person to be arrested is in fact a criminal, notwithstanding the existence of objective probable cause.

5. Whether the police subjectively believe that a place to be searched contains criminal evidence, notwithstanding the existence of objective probable cause.

The first three of these assertions are directly supported by Supreme Court holdings, discussed above. The latter two are not directly supported by Supreme Court holdings, but are implicit in *Devenpeck's* statement that probable cause must be supported by "facts known to the officer." It cannot, or at least should not, be said that facts are "known" to the officer if he does not believe those "facts."

Finally, it should be reiterated that where there really never was factual probable cause, even though the police reasonably and in good faith believed there was, a search or arrest is invalid and the evidence must be excluded, except in warrant cases. *Beck* held this and *Leon* made it clear that it was only announcing an exception to the *Beck* principle in warrant cases.[113] Likewise, when there really is factual probable cause, it does not matter if the police thought that the evidence was insufficient to qualify as legal probable cause, as long as they believe the facts that constitute probable cause. This is the correct, and limited, understanding of the objectivity principle.

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recklessness.

[112] Groh v. Ramirez, 540 U.S. 551, 553-55 (2004) (involving a civil suit based on a negligent mistake as to the particularity of the items to be seized).

[113] United States v. Leon, 468 U.S. 897, 915 n.13 (1984) ("We adhere to this view [from *Beck* that good faith belief is required but 'not enough'].") (citation omitted).

II. Reasonable Suspicion

Stops and frisks pose somewhat different issues. First, they are not based on a quantum of evidence, but upon reasonable suspicion, an apparently mixed criterion requiring a subjective belief that is objectively reasonable. As one court put it, "[a]n officer cannot have a *reasonable* suspicion that a person is armed and dangerous when he in fact has *no* such suspicion."[114] Second, they are a lesser intrusion than probable cause based searches and arrests, requiring less justification, and involving different concerns, so police intent considerations might be different.

Terry v. Ohio,[115] the source of the stop and frisk doctrine in the Supreme Court, is not completely clear on this issue. First, the term reasonable suspicion does not appear in the *Terry* opinion, but only disparagingly in Justice Douglas' dissent.[116] Likewise, it appears only with reference to the use of that term in the New York statute in the *Terry* companion case of *Sibron v. New York.*[117] Thus, while that term has become accepted by the Court as the holding of *Terry*,[118] one cannot place much weight on the literal language.

Terry itself explains the nature of the suspicion that must be entertained by the police several times: "[W]here [the officer] has reason to believe that he is dealing with an armed and dangerous individual . . . the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[119] These statements and others, as Professor LaFave concedes, suggest that "a protective search is permissible only when the officer *reasonably believes* that the suspect *is* armed and dangerous."[120] (That is the mixed subjective and objective test).

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[114] United States v. Lott, 870 F.2d 778, 7884 (1st Cir. 1989).

[115] 392 U.S. 1 (1968).

[116] *Id.* at 37 (Douglas, J., dissenting).

[117] 392 U.S. 40 (1968).

[118] For the most recent example, see *Illinois v. Caballes*, 543 U.S. 405, 415 (2005).

[119] *Terry*, 392 U.S. at 27.

[120] LaFave, *supra* note 17, § 9.6(a), at 621.

But then the Court "holds . . . that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity *may* be afoot and the persons he is dealing with *may* be armed and dangerous, [he may stop and frisk them]."[121] Professor LaFave concludes that this passage establishes an objective standard which does not require that the officer actually believe that criminal activity is afoot or that the suspect is armed and dangerous.[122] It seems to me, however, that a suspicion that a person *is* armed and dangerous means the same thing as a suspicion that he *may* be. Suspicions, by definition, are not conclusive. In my view, *Terry* and *Sibron* do require a subjective belief on the part of the police that criminal activity is (or may be) afoot and that the suspect is (or may be) armed and dangerous, as well as an objectively reasonable belief in the same. *Terry* really is fairly clear on this point: "simple 'good faith on the part of the arresting officer is not enough.'"[123] That is, a good faith belief is a necessary, but not a sufficient, condition for a valid stop or frisk.

The circuits are split on this issue[124] and Justice Souter, concurring in the unrelated case of *United States v. Knights*,[125] noted that he would reserve it. No doubt, some members of the Court would like to abandon the subjective suspicion component, whatever *Terry* may have intended and LaFave opines that this purely objective approach is the correct position.[126]

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[121] *Terry*, 392 U.S. at 30.

[122] LAFAVE, *supra* note 17, § 9.6(a), at 621.

[123] *Terry*, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

[124] *Compare* United States v. Lott, 870 F.2d 778, 783-84 (1st Cir. 1989), *and* United States v. Prim, 698 F.2d 972 (9th Cir. 1983) (actual suspicion required), *with* United States v. Holmes, 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1175 (2005), United States v. Rowland, 341 F.3d 774 (8th Cir. 2003), *cert. denied*, 540 U.S. 1093 (2003), *and* United States v. Brown, 188 F.3d 860 (7th Cir. 1999) (subjective suspicion not required).

[125] 534 U.S. 112, 123 (2001) (Souter, J., concurring). *Knights* held that evidentiary searches based on reasonable suspicion were permissible when a probation agreement authorized them. *Id.* at 121-22 (majority opinion).

[126] "The test is an objective rather than a subjective one, just as with probable cause to arrest or search, and thus it is not essential that the officer actually

Rather than dealing with the often contradictory facts in the court of appeals cases, consider a hypothetical. Suppose the police see an individual whom they have reasonable suspicion to believe possesses narcotics, combing his hair with a large comb as they approach him. He puts the comb in his back pocket just before they grab him. A frisk reveals a single hard object in that pocket. The police pull it out. It is, of course, the comb, but the act of pulling it out also pulls out a packet of white powder, which turns out to be cocaine.

There are two issues here (the stop is legal by definition). The first is the frisk. Is the frisk appropriate when the police have no reason to believe that the suspect is armed beyond their belief that he possesses narcotics? While the answer to this question is clearly no under *Terry*, the Court more recently seems to have heeded Justice Harlan's admonition, concurring in *Terry*, that if the stop is justified, the frisk must be as well, since otherwise the stop is too dangerous.[127] Thus, in *Minnesota v. Dickerson*, the Court did not upset the finding of the lower courts that a frisk was justified where police suspected only narcotics possession.[128]

The *Dickerson* case went on, however, to hold that *seizure* of a hard lump from the suspect's pocket "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*."[129] "[T]he officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby."[130] Likewise, it would seem that seizure of the comb was improper when police knew that the comb was what they felt.

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have been in fear." LAFAVE, *supra* note 17, § 9.6(a), at 623 (footnote omitted).

[127] *Terry*, 392 U.S. at 31-34 (Harlan, J., concurring). "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* at 33. *See Adams v. Williams*, 407 U.S. 143 (1972), (upholding an immediate frisk prior to any questioning; however, the information that the police were given was that the suspect had a gun).

[128] 508 U.S. 366 (1993).

[129] *Id.* at 378.

[130] *Id.* (alteration in original).

In the usual case, however, the police will not "know" that the object in question is not, or could not be used as a weapon. In *United States v. Holmes*,[131] for example, where the police felt a hard object in the suspect's pocket that he declared, and they believed, was a scale, the court nevertheless upheld the extraction of the scale from his pocket, and it was subsequently discovered that the scale had cocaine residue on it. As Judge (now Chief Justice) Roberts wrote for the court: "We cannot fault the officer for taking the simple step of checking to ensure that the hard object was not something more threatening before continuing."[132]

In the end, then, the standard of police intent for stops and seizures following a frisk that most courts are applying would appear to be the same as the Supreme Court is applying to arrests and searches. If police *know* that there is no reason for suspicion, despite appearances, the stop or seizure is no good. But if they do the procedure even though they do not think that it is really necessary, as in *Holmes*, it will be upheld. As for frisks, it seems, after *Dickerson*, that if the stop is justified, the frisk may be automatic.

But is this the right standard? Arguably not. *Terry* represents an exception to the general Fourth Amendment requirement of probable cause prior to seizures of the individual (the stop), searches (the frisk) and seizures of one's effects. Actual fear on the part of the police, who may be unreasonably fearless, surely should not be required,[133] despite language in *Terry* to the contrary.[134] But, in addition to objective grounds, should not the police have an actual subjective belief that the suspect really is committing (or has committed) a crime, that he really is armed, and that what they felt really is a weapon?

The answer, in my view, differs at each stage of the process. At the stop stage, just because someone looks like he is up to no good, the police should not be able to stop him unless they believe it. This is, as noted, what *Terry* seems to require. It is fruitless to argue that police intent is too hard to plumb. As already established, if the police *know* that the suspect is not, for example, a wanted criminal, even though he looks like one, an arrest, and therefore a stop, is no good.[135] Since police intent is thus already in play, why should not a determination of the police's good faith belief also be probed? That is, if the police see a person who looks like a wanted criminal, but do not believe that he is (even though they don't know it), this stop should also be no good. Of course this will be hard to determine and of course the police, once they know it is an issue, will lie about it. But the same objection applies to police knowledge, which the Court unanimously agreed in *Devenpeck* is always in issue.[136] Thus, for stops, as for arrests and searches, the police should have, as *Terry* suggested, an actual suspicion that is also reasonable. This limitation would reduce the use of stops for harassment purposes where police may have objective grounds for suspicion, but cannot convince the court that they actually suspected the individual stopped.[137]

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[131] 385 F.3d 786 (D.C. Cir. 2004).

[132] *Id.* at 790-91.

[133] This is the basis on which many courts have decided this issue. *See* LAFAVE, *supra* note 17, § 9.6(a), at 623 n.36.

[134] "[W]here nothing in the initial stages of the inquiry serves to dispel his reasonable fear for his own or others' safety, he is entitled . . . to conduct [a frisk]." *Terry*, 392 U.S. at 30.

As to frisks, since we have now established a real suspicion standard for stops, and thus limited their scope somewhat,[138] I have no difficulty allowing an automatic frisk, even if the police do not believe the suspect to be armed, at least when the case involves a crime where it is objectively reasonable to suspect that a weapon might be involved.[139] Police protection figures into this equation, as it does not in the stop issue, and it is both unrealistic and dangerous to expect the police to forcibly stop and question many suspects without determining that they are unarmed at the outset. Without frisking, they cannot know whether the suspect is armed or not. (Of course, not every police inquiry of a citizen on the street is a stop based on "reasonable suspicion that criminal activity is afoot" and that the citizen in question is the suspected criminal.) Thus, I agree with LaFave that a subjective belief that the suspect is either armed or dangerous is not necessary for a frisk once a valid stop is made.

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[135] Devenpeck v. Alford, 543 U.S. 146 (2004).

[136] *Id.* at 153.

[137] *See* David Harris, *Factors for Reasonable Suspicion, When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

[138] Some courts, in imposing a real suspicion test for strip searches at the border, have assumed that this is also what is required for a frisk. *E.g.*, United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970).

[139] As LaFave notes, this is the way the lower courts have decided this issue. LAFAVE, *supra* note 17, § 9.6(a), at 625-26. In other cases, the courts look for additional circumstances. See *id.*, § 9.6(a), at 628, and cases cited therein. In the District of Columbia, where I was a prosecutor, the phrase used by police to justify frisks was "furtive movement." *But see* David A. Harris, *Frisking Every*

Seizures of objects found during the frisk pose a similar issue. Once the suspect has been stopped and frisked, the removal from his person of an object that could be a weapon, even though the police do not think it is, is a sufficiently small incremental intrusion into his liberty/privacy interests that it should be allowable, as *Holmes* held The small chance that the police might be wrong could result in a policeman's being killed or injured. Also, hard objects, even if not designed to be weapons, can be dangerous in the hands of a person who realizes that he is about to be arrested. Only in a case like *Dickerson*, where the police "know"(which in the Model Penal Code includes "practically certain") that what they have felt is not a weapon and not dangerous, should the seizure be disallowed.

In sum, as to stops and frisks, the police must have a subjective suspicion that criminal activity is, or has been, afoot in order to stop someone, and that suspicion must be reasonable. They need not have a subjective fear or sense of danger in order to frisk if the nature of the crime suspected objectively suggests that the suspect may be armed. And they need not subjectively fear danger to seize something found on his person if it was reasonable to believe that the object might serve as a weapon.

Suspect: The Withering of Terry, 28 U.C. DAVIS L. REV. 1, 5 (1994) (decrying lower courts permissiveness in allowing frisks).

III. OTHER SITUATIONS

Once one starts thinking in these terms, he realizes that there is no such thing as a purely objective inquiry; the subjective beliefs of the police are potentially present in every kind of case. For example, in order to make a valid entry into a home to execute an arrest warrant, the Supreme Court, in *Payton v. New York*,[140] held that not only must the officer have a warrant based on probable cause (subject to the considerations already discussed), but also that he must have "reason to believe the suspect is within."[141] But surely this is not intended as a purely objective test. If the officer knows that the suspect is not there, even though objective evidence exists to suggest that he might be, an entry would be improper.[142] The result should be the same if the officer does not believe the suspect to be there. Reason to believe should be read literally to require a belief based on reason.

In a similar vein, in *Richards v. Wisconsin*,[143] the Court rejected Wisconsin's blanket rule that a no-knock entry was always allowed in felony drug cases. Instead, the Court required a case-by-case consideration of whether "the police . . . have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[144] The *Richards* Court cited *Maryland v. Buie*,[145] where a protective sweep of a house during an arrest was allowed where the officers had a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[146]

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[140] 445 U.S. 573 (1980).

[141] *Id.* at 603. As LaFave points out, "what this means continues to be a matter of considerable uncertainty." LAFAVE, *supra* note 17, § 6.1(a), at 265; *see also* Matthew A. Edwards, *Posner's Pragmatism and* Payton *Home Arrests*, 77 WASH. L. REV. 299, 394 (2002) (noting that courts are lenient with police on the reason to believe standard).

[142] LaFave agrees. LAFAVE, *supra* note 17, § 6.1(a), at 268.

[143] 520 U.S. 385 (1997).

[144] *Id.* at 394.

[145] 494 U.S. 325 (1990).

Since *Richards* rejected an objective approach offered by Wisconsin, it would seem that the test adopted by the Court was intended to be both subjective and objective. That is, one could argue, as Wisconsin did, that there is *always* a reasonable basis to fear danger or destruction of evidence in a felony drug case. In rejecting that approach and in finding that the officers had reason to believe that evidence might be destroyed if they knocked, the Court suggested that there must be a subjective belief that is reasonable for a no-knock entry to be valid.

Likewise in *Buie*, where the police would no doubt prefer a rule that would allow them to sweep the rest of a house during every home arrest, the court required a reasonable belief that such a sweep is necessary. However, as argued above with regard to frisks, since police safety is involved in both the *Richards* and *Buie* situations, I would not require the police to have a subjective apprehension of danger in these cases. As long as the objective facts would create such an apprehension in a reasonable officer, this should be sufficient. By contrast, if the police concern is with preservation of evidence, they must have a subjective belief that evidence is about to be destroyed.[147]

By the same reasoning, application of the exigent circumstance exception, of which *Richards* and *Buie* are essentially subclasses, should depend on the nature of the police activity in question. If the police are in hot pursuit of a fleeing felon, then an actual belief in the guilt of the suspect and that he is really fleeing should be required before police can enter a building to find him. Likewise, if the police seek to enter a house without a warrant to avoid the destruction of evidence, an actual belief that the evidence is there and is likely to be destroyed is necessary. The police should not be able to thrust themselves into these privacy-destroying situations without the requisite good faith beliefs.

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[146] *Id.* at 337.

[147] See *Davis v. Washington,* 126 S. Ct. 2266 (2006), where the Court makes a similar distinction.

If, on the other hand, police hear a shout of "Help!" issuing from an apartment, an entry to check it out is appropriate, even if the police admit that they thought it more likely that the shout came from a loud TV program. Unless they "know" (*i.e.*, are practically certain) that this was not a real cry for help, it makes sense to allow them to err on the side of action rather than inaction. Thus, if police are acting for the protection of themselves or others, more leniency should be allowed than when they are involved in crime detection. This is now the Court's position, as *Brigham City v. Stuart* adumbrates.[148]

In summary, issues concerning police intent are present in virtually every Fourth Amendment case. Thus, there is no such thing as a purely objective Fourth Amendment inquiry. Once one concedes, as the Court does in *Devenpeck*, that what the police know is part of the probable cause equation, the genie of police intent is out of the bottle. And it follows, from this concession, as well as from a proper understanding of the history of the Fourth Amendment, that if police knowledge is required as a basis for searches and seizures, then police belief in the facts, and the implications from those facts, is also a prerequisite of a valid search or seizure.

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[148] 126 S. Ct. 1943 (2006); *see also* Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that the validity of a roadblock depends on whether it is for traffic safety or crime detection purposes).

SUBJECTIVE "INTENT" AS A COMPONENT OF FOURTH AMENDMENT REASONABLENESS

George E. Dix[*]

INTRODUCTION

The Supreme Court has increasingly used language suggesting that Fourth Amendment standards are entirely objective ones that give no significance to the state of minds of the officers whose actions are under analysis. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer,"[1] Justice Scalia reiterated in the Court's 2004 opinion in *Devenpeck v. Alford*.[2]

Few corollaries of this approach are more entrenched than the one Justice Scalia also noted in *Devenpeck* that the Court had "repeatedly explained."[3] Quoting *Whren v. United States*[4] in turn quoting *Frank Scott v. United States*,[5] Justice Scalia announced once again:

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the

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[1] Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

[2] 543 U.S. 146 (2004).

[3] *Id.* at 153.

[4] 517 U.S. 806 (1996).

[5] 436 U.S. 128 (1978).

> action taken as long as the circumstances, viewed objectively, justify that action.[6]

Under this approach, the reasonableness of law enforcement action subject to Fourth Amendment scrutiny does not depend on any correlation between judicial consideration of whether the action was reasonable, on the one hand, and the officer's actual motivation or state of mind, on the other.

The matter can be put more specifically by considering when, in litigation, a party defends the Fourth Amendment reasonableness of police action on a particular legal theory—for example, that the officer was reasonably making an arrest for crime A—what the party must prove. Must the party prove that the officer in fact subjectively considered whether she was seizing the person? Whether her seizure was in some sense an arrest? That she was aware of the facts on which her action is supported in the litigation? That she subjectively knew the legal standard relied upon in the litigation—probable cause in the case of an arrest? That she believed the facts permitted her to make the seizure she was making?

The Supreme Court's hostility towards subjective components of Fourth Amendment standards, evident in *Frank Scott*, *Whren* and *Devenpeck*, led the Court in *Brigham City v. Stuart*[7] to state in the most unequivocal terms it has used that officers' subjective states of mind are irrelevant to Fourth Amendment reasonableness. State courts have shown little more sympathy for a subjective approach under State law. A notable exception is the Supreme Court of Oregon, which has construed the probable cause requirement in the Oregon Constitution[8] as having both a subjective and an objective component: "An officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must be objectively reasonable in the circumstances."[9] Generally, however, state tribunals have followed the Supreme Court's lead.

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[6] *Devenpeck*, 543 U.S. at 153.

[7] 126 S. Ct. 1943 (2006).

[8] OR. CONST., art. I, § 9.

[9] State v. Owens, 729 P.2d 524, 529 (Or. 1986). *But see* State v. Nagel, 880

This overwhelming judicial commitment to a largely objective approach has been generally accepted by commentators,[10] including Professor Wayne LaFave, probably the leading Fourth Amendment academic. Professor LaFave has, in part,[11] observed that a subjective aspect of reasonableness would require "that policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers."[12] To the extent that there has been dissent, it has been largely limited to the so-called "pretext" situation in which officers subjectively and often carefully rely on a legal theory they believe in some ultimate sense does not really apply to the situation. This is because they perceive that there is no legal theory consistent with their "real" motivation that would apply to the facts before them.[13]

The general hostility to subjective components of Fourth Amendment law is worth a more careful examination. The Fourth Amendment issues may be pretty much resolved after *Brigham City*. State law questions remain, however, and the

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P.2d 451, 462-63 (Or. 1994) (Van Hoomissen, J., concurring in part and specially concurring in part) (arguing the subjective component of probable cause recognized in *Owens* is not properly a part of probable cause under state constitution). This court also construed state statutory law as inserting a subjective component into the standard for investigatory stops. *See* State v. Belt, 932 P.2d 1177, 1179-80 (Or. 1997).

[10] Professor Burkoff showed more sympathy to subjective considerations than many commentators, although he framed the issue so as to focus not on the requirement of reasonableness but on possible attacks. *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982), discussed in more detail at notes 316-18 *infra*.

[11] Professor LaFave's analysis is considered in more detail later. *See infra* text accompanying notes 273-77.

[12] WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.04(d) (4th ed. 2004) (quoting State v. Romeo, 203 A.2d 23, 32 (N.J. 1964)).

[13] *E.g.*, Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L. REV. 611 (2003). The somewhat more general tendency to consider subjective awareness in terms other than as part of the ordinary and usual demands of Fourth Amendment reasonableness is illustrated by George C. Thomas III and Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21 (1993).

soundness of the basis for Fourth Amendment law is certainly relevant to whether state courts should adopt for state law purposes the approach of the Supreme Court in Fourth Amendment law.

This article first traces the Supreme Court's consideration and disapproval of subjective considerations in Fourth Amendment law. Because of the minimal discussion of these matters in the Court's opinions, this effort looks to the contentions put before the Court even if those are not fully reflected in the Court's explanations. The article then turns to the merits of the major issue posed by the problem: whether Fourth Amendment reasonableness of law enforcement officers' conduct should depend upon the officers' having been subjectively motivated in some sense by the considerations on which that conduct is defended in litigation.

As a preliminary matter, it is necessary to note that the issue could be one of substantive Fourth Amendment law, that is, the law defining what are searches and seizures and whether particular searches and seizures are reasonable.[14] Alternatively, the issue could be one concerning the content of the exclusionary penalty following a demonstration that authorities' acquisition of offered evidence is related to unconstitutional conduct. *Devenpeck*'s reaffirmation of the objective approach in the context of a civil suit for damages strongly suggests that the Court sees the issue as one of substantive Fourth Amendment law—whether officers' motivation affects the reasonableness of searches and seizures.

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[14] LaFave acknowledges that officers' states of mind might be implicated in either substantive Fourth Amendment law or exclusionary rule doctrine. He discusses it as part of his consideration of the exclusionary sanction in large part because he believes it should be resolved primarily on the basis of exclusionary sanction considerations—how best to prevent constitutionally unacceptable law enforcement conduct by means of excluding evidence in criminal prosecutions. LAFAVE, § 1.04.

I. DEVELOPMENT OF THE SUPREME COURT'S "OBJECTIVE" APPROACH

The development of the Supreme Court's clear current objective approach to Fourth Amendment standards is the result of a complex series of cases. These are considered in Parts C and following. In interesting contrast stands the pre-*Mapp* assumption that Fourth Amendment standards have a subjective component, addressed in Part B. And, as considered in Part A, this is all against the Court's acknowledgement that the basic standards for deciding whether law enforcement conduct even triggers Fourth Amendment analysis has a partly subjective standard.

A. *The Underlying Need for "Intentional Conduct"*

Clearly on the most basic substantive level Fourth Amendment law has a subjective component. In *Brower v. County of Inyo*,[15] the Court held that a seizure of the person occurs only if an officer's acquisition of control over a suspect is intentional. Further, an intentional seizure requires "a governmental termination of freedom of movement *through means intentionally*

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[15] 489 U.S. 593 (1989).

> But if the means intended to restrict a suspect's liberty in fact have that result, the fact that the means accomplished this result in an unintended manner will not put the situation beyond Fourth Amendment coverage. Thus an officer who chases a suspect driving a vehicle intending to frighten the suspect into submitting to the officer's control and who, by his pursuit causes the suspect to crash his vehicle and thus become available for arrest, does not "seize" the suspect because the intended result—the restriction of the suspect's liberty—was not accomplished by the intended means—the fright engendered by the pursuit. County of Sacramento v. Lewis, 118 S. Ct. 1708, 1715 (1998). But an officer who seeks to acquire control over a suspect by shooting the suspect in the leg and who accomplishes this result but by hitting the suspect in the heart does seize him. This is because the officer accomplished the acquisition of control by the means intended—the firing of the shot. The fact that the means accomplished the result in an unintended *manner* is not significant.

Brower, 489 U.S. at 598-99.

applied."[16] Why? Primarily because the requirement of intent "is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[17]

Brower, then, imposes a minimal purely subjective requirement[18] for triggering Fourth Amendment coverage—the acquisition of control over a suspect is a "seizure" only if the officer intended to accomplish this by the means actually used to do so. Almost certainly a seizure of property must be subjectively intentional in the same sense and a search must be the result of conduct subjectively intended to obtain private information regarding the suspect.

Although *Brower* was not decided until 1989, almost certainly the Court would have resolved the issue in the same manner had it been presented earlier. At no point then, was Fourth Amendment law ever purely objective. Whether once the Fourth Amendment is applicable, its reasonableness standards thereby triggered have subjective components has been treated quite haphazardly by the Court

B. The Early Assumption that Appropriate Subjective Motivation is Required

Prior to the explosion of Fourth Amendment law after

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[16] *Id.* at 597 (emphasis in original).

[17] *Id.* at 596. In addition, the Court noted that the grievances at which the Amendment was directed did not involve unintended consequences of governmental action, apparently establishing that the framers intended that the provision only cover such action. *Id.*

[18] Yet *Brower* left some doubt whether this requirement is in fact a subjective one. Justice Scalia's opinion at one point disclaimed the practicability of "inquiry into subjective intent." *Id.* at 598. This convinced the four concurring justices that the criterion is a purely objective one, which they characterized as requiring a determination of "objective intent." *Id.* at 600 (Stevens, J., concurring). In fact, Justice Scalia's comment appears to have been intended only to disclaim any inquiry into whether an officer subjectively intended that the intended means accomplish the intended result in the precise manner in which it actually did. *See supra* note 15. Justice Scalia appeared to believe that requiring that an officer have subjectively intended the means to accomplish the result in the precise manner it actually did would involve inquiry into an exceptionally difficult to ascertain state of mind and thus would not be "practicable." *Brower*, 489 U.S. at 598.

Mapp v. Ohio,[19] the Supreme Court's Fourth Amendment case law uncritically assumed that Fourth Amendment reasonableness required that an officer has been actually motivated by the rationale later relied upon as supporting the officer's actions.

The Supreme Court's pre-*Mapp* approach to the nature of Fourth Amendment is illustrated by its treatment of probable cause. Discussions have used terminology that could be read as suggesting a purely objective standard or as indicating a standard with both subjective and objective components. Almost certainly the terminology used reflected a total lack of recognition of any issue.

In 1813, Chief Justice John Marshall in *Locke v. United States*[20] addressed the term "probable cause" as used in a statute providing for forfeiture of certain ships' cargo. According to Marshall, the term "has a fixed and well known meaning," and "imports a seizure made under circumstances which warrant suspicion."[21] This, of course, suggests a purely objective standard that requires no actual suspicion of any degree.

In *Carroll v. United States*,[22] decided in 1925, the Court explained that probable cause means "a belief, arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure . . . ."[23] This suggests that the officer must have had a subjective belief based on facts subjectively known to the officers. Later in the opinion, however, the Court set out a variety of other statements of probable cause some of which were as apparently objective as that given in *Locke*.[24] Similarly, in *Henry v. United States*,[25] the Court observed that "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[26] But in the immediately preceding sentence it had noted that "good faith on the part of the arresting officers is not enough."[27] "[N]ot enough," of course, indicates that is it required but not itself sufficient. Almost certainly this inconsistent use of language within consistent opinions reflects a failure to even recognize the issue.

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[19] 367 U.S. 643 (1961).

[20] 11 U.S. 339 (1813).

[21] *Id.* at 348. *Accord*, Stacey v. Emery, 97 U.S. 642, 645 (1878) ("facts and circumstances . . . such as to warrant a man of prudence and caution in believing that the offence [*sic*] has been committed").

[22] 267 U.S. 132 (1925).

[23] *Id.* at 149.

[24] *Id.* at 161-62.

[25] 361 U.S. 98 (1959).

Carroll's discussion, however, suggested uncertainty only as to whether a subjective belief or conclusion that seizable items were present was necessary. Analysis must begin, it noted, by identifying the "circumstances known to the seizing officer."[28] This made clear that reasonableness as well as the criteria for identifying searches and seizures had at least one subjective component.

In *Jones v. United States*,[29] however, the Court explicitly embraced the position that probable cause requires an officer to have been actually and subjectively motivated by the basis later offered to justify the officer's action. Whether the case is firm authority for this position, however, is less than clear if the submissions, as well as the opinion, are considered.

Jones arose from a challenge to the admissibility of moonshine evidence seized in a search of Jones' home.[30] Jones sought review on the ground that the lower courts had improperly held that a warrantless search was permissible upon probable cause to believe seizable items were in the premises. The Government responded before the Court that the search was supportable, not as one to locate and seize items, but rather as one to locate and arrest a person the officers had probable cause to believe was on the premises and committing an offense.[31]

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[26] *Id.* at 102

[27] *Id.*

[28] *Carroll*, 267 U.S. at 149.

[29] 357 U.S. 493 (1958).

[30] *Id.* at 494.

[31] In fact, the Court posed the issue as whether the search was reasonable as incident to Jones' arrest, reflecting what in retrospect was an unfortunate state-

In support, the Government assumed its theory required proof that the officers were motivated by a desire to find and arrest the suspect. It offered in support that "it is a fair inference that the agents entered to arrest [Jones], and not to make a search."[32] Jones, in response, accepted that the Government's theory required proof that the agents were motivated by a desire to find and arrest him. He contended, however, that the record failed to reflect that this was their motive, and that the courts below had not found any such motivation.[33]

The Court held the search unreasonable.[34] It adopted the common assumption of the parties—that the Government's theory required proof that the officers were subjectively motivated by the desire to find and seize Jones. It then rejected the Government's argument on the ground that it had failed to support it with proof of the necessary motivation: "The testimony of the federal officers makes clear beyond dispute that [the officers'] purpose in entering was to search for distilling equipment, and not to arrest [Jones]."[35]

Jones, of course, contains language suggesting that a search justified at trial as one to locate and arrest a suspect requires that the officers have acted for the "purpose" of locating and finding that suspect. Fairly read, however, it simply reflects an uncritical assumption by the Court that the parties accurately assumed a Fourth Amendment requirement that officers be actually motivated by the legal rationale relied upon in later litigation. This is not surprising. A subjective intention to locate a person to arrest seemed implicit in the words used to state a rule permitting searches to find and arrest a suspect,

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ment of that issue. *Id.* at 499. A search incident to an arrest would be permissible, of course, only if the arrest was reasonable, and the arrest would be tainted if the entry to make it was unreasonable. Thus, the validity of the entry turned upon whether it was a valid exercise of the power to sometimes enter without a warrant to search for a person in order to arrest that person.

[32] Brief for the United States at 8, 17, Jones v. United States, 357 U.S. 493 (1958) (No. 331).

[33] Reply Brief for the Petitioner at 3-4, *Jones*, 357 U.S. 493 (No. 331).

[34] *Jones*, 357 U.S. at 493.

[35] *Id.* at 500.

just as forty years later in *Brower*, an intent to seize seemed "implicit in the word 'seizure.'"[36]

Nevertheless, the Government did not offer in *Jones*, and thus the Court did not reject, a contention that the reasonableness of the search was to be determined on a purely objective basis, that is, by inquiring only whether a reasonable officer could (or would) have regarded the search as necessary to locate and seize a person reasonably believed to be in the process of committing a crime. *Jones* cannot fairly be read as authoritative precedent for the proposition that exceptions to the Fourth Amendment warrant requirement require that officers have been motivated by the rationales for which relied-upon exceptions are recognized.

Jones nevertheless almost certainly reflected a widespread assumption that most Fourth Amendment substantive rules making particular types of law enforcement conduct reasonable had an initial subjective component. A warrantless arrest of X for crime Y, the courts generally assumed, required that the officer actually and subjectively believed that X committed crime Y or at least that the facts sufficiently indicated his guilt of that offense. Controversy generally arose from the second and objective requirement that the basis for this belief be sufficient as measured against a reasonable person standard.

The basis for this assumption was most likely the same as the Court would later rely on in *Brower*—the implicit meaning of the terms used and the concepts invoked. Probable cause implicitly referred to the "cause"—and thus the motive—for the officer's action in taking the suspect into custody. The terminology and concepts used in discussions intuitively suggested the legal standard had a subjective basis or at least a subjective component.

*C. Post-*Mapp *Focus on Officers' Subjective Motivation:* Painten

Fourth Amendment law took on considerably greater significance in 1961 when in *Mapp* the Supreme Court held that evidence tainted by a violation of the Fourth Amendment had to be excluded in state criminal litigation.[37] Shortly after *Mapp*, the Court appeared ready, in *Massachusetts v. Painten*,[38] to address the role of subjective motivation in the Fourth Amendment law. Although the Court did not end up reaching the merits in *Painten*, the case set the stage for an objective focus as the Court began to develop the Fourth Amendment law thrust into public attention by *Mapp*.

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[36] Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

In 1966, the First Circuit held in *Painten* that the state defendant's Fourth Amendment rights were violated when the prosecution was permitted to use against him evidence tainted by police officers' approach to his residence.[39] Although the analysis was somewhat confused, the court appeared to reason that the officers' knock on Painten's door was a violation of the Fourth Amendment because the officers intended to enter and search regardless of whether they developed facts that would, under Fourth Amendment law, permit that action.[40] In seeking review, Petitioner Massachusetts represented:

> [T]he *Painten* decision shifts the test of illegal searches and seizures from one of overt acts to one of the thoughts of the police; it radically changes the law of search and seizure as exponded by the highest court in the land. If certiorari is to be denied in this case, the *Painten* decision will become a dangerous and far-reaching precedent for all law enforcement officials across the nation.[41]

The Supreme Court granted review.[42]

Petitioner Massachusetts explained at length its position in terms of the inappropriateness of subjective considerations:

> There are compelling and obvious reasons for the adop-

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[37] Mapp v. Ohio, 367 U.S. 643 (1961).

[38] 386 U.S. 931 (1967).

[39] 368 F.2d 142 (1st Cir. 1966).

[40] *Id.*

[41] Petition for Writ of Certiorari at 11, Massachusetts v. Painten, 389 U.S. 560 (1968) (per curiam) (No. 37).

[42] *Painten*, 386 U.S. at 931.

> tion of an objective rather than a subjective standard in determining the existence or non-existence of probable cause for an arrest. How can one possibly ascertain the real motives of any person, including a police officer, for doing what he does? Moreover, it would seem obvious that, for Fourth and Fourteenth Amendment purposes, what a police officer does is more important than what he thinks. A police officer's state of mind cannot violate the constitutional rights of an accused; only his actions can violate the rights of an accused. If the courts are to attempt to decide a case based solely on the thinking of the police as opposed to overt acts, the result will place a premium on prevarication and on the giving of smooth and bland reasons by carefully coached police witnesses. Moreover, it will be impossible to ascertain in advance whether a particular search was or was not legal.
>
> . . . What counts is what the officer does when he arrives at the home of a suspect, and whether what he does violates any substantive rights of the respondent. The officer's testimony as to his own personal reasons for going to the respondent's house is irrelevant.
>
> If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials. Under the decision of the Court of Appeals, the attitude of police officers would necessarily have to be: "Don't think, or your subsequent actions will be invalid." Even worse, police officers would feel compelled to give reasons other than the true ones.
>
> Just as an individual cannot be arrested for what he thinks—just as he must first commit some overt act which constitutes a crime—so a police officer should not be precluded from making an arrest merely because he has private thoughts of his own. So to hold would severely hamper the prosecutions of crime throughout the country. With the increase in crime across the nation, law-enforcement officials need help, not hindrances, in protecting the interests of society. This court can give law-enforcement officials this help while, at the same time, this court can insist that, by every objective standard, proper regard be paid to the protection of

the rights of the accused.[43]

Respondent Painten did not defend the result below as one focused on the subjective motivation of the officers. Rather, he urged it be upheld as based on a finding that the officers entered without effective consent and that all of the evidence was tainted by this unreasonable search. In a somewhat confusing argument, he contended that the court of appeals did not impermissibly rely "solely" on the officers' subjective intentions. He did, however, concede that the court had considered this and appeared to assume that this was appropriate.[44] At no point did respondent Painten explicitly explain how or why the officers' intentions were properly considered on reasonableness.

The real case for accepting the subjective aspects of the analysis of the court of appeals was made by an amicus brief submitted by the American Civil Liberties Union and coauthored by Professor Anthony Amsterdam.[45] Somewhat surprisingly, the brief urged the Court, as a general matter, to embrace an objective perspective in Fourth Amendment law:

> This is so for reasons which the Commonwealth articulates forcefully. Fourth Amendment rules are principally mandates for the harried policeman and the hurried motions judge. They should be as simple and workable as possible, so that the policeman can know what is expected of him and the judge can enforce it. Subjective standards are difficult to abide by, hard to administer. Judicial investigation of police purpose is a frustrating, ordinarily futile endeavor; and the policeman cannot predict its outcome. The impracticable trial of mental states is, in any event, not worth the trouble, since whatever it is that the policeman does is equally intrusive upon his suspect's privacy, whatever its motivation. What the citizen cares about, and what the Amendment restricts, is

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[43] Brief for the Petitioner at 8-9, *Painten*. 389 U.S. 560 (No. 37).

[44] Brief for the Respondent at 14-16, *Painten*, 389 U.S. 560 (No. 37).

[45] Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae, *Painten*, 389 U.S. 560 (No. 37) (hereinafter ACLU Brief). The brief was signed by Professor Amsterdam and Melvin L. Wulf, as attorneys for the amici. It is a curious document consisting entirely of argument and containing no citations to authorities whatsoever.

> where, under what circumstances, the policeman's body ends up, not by what cogitative paths his mind leads him there.[46]

In exceptional situations in which the Fourth Amendment puts few or no limits upon intrusive police conduct, the brief continued, the Court should impose limits based on the officers' subjective motivations. It explained:

> This is certainly the case, we believe, with the power of policemen to knock on the doors of dwellings in the night time, as happened to Donald Painten. A night-time knock on the door is no small intrusion to a home-owner. The potential of the knocking practice for abuse—its potential employment by police with no legitimate business, banging around to se[e] whether something turns up—must surely be apparent . . . . And, on the Commonwealth's own theory in this Court, the practice is not objectively regulable[,] because there are no necessary objective preconditions to its validity: police may knock on *any* door, on *any* set of facts, with-out probable cause, as they did to Painten. We think that state of affairs falls considerably short of the protection of the people in their houses envisaged by the Fourth Amendment. Unless this Court is prepared to declare a broader "objective" safeguarding rule—that police without a warrant and without probable cause are never permitted to knock on the doors of dwellings in the night time; or that, at the least, anything they observe

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[46] *Id.* at 9. Professor Amsterdam again took this position, at least in one specific context, in his 1974 Oliver Wendell Holmes Lectures. Addressing the stop-and-frisk power, he said:

> [One possible] curb against abuse is to inquire into the officer's motive or purpose for conducting the stop and frisk. But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974).

> as a result of the knock is inadmissible in evidence in a subsequent criminal trial of the home-owner—we submit that the least the Amendment requires is the che[c]k of a "subjective" inquiry into the question whether the knocking officer's purposes were within the range of those legitimate ones for whose effectuation the power to knock is given him.[47]

After briefing and oral argument, a majority of the Court announced, "we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case."[48] It therefore dismissed certiorari as improvidently granted.[49]

Three, and perhaps four,[50] members of the Court disagreed. Justice White, joined by Justices Harlan and Stewart, contended in dissent that the Court should decide the case to disapprove the analysis of the court of appeals and, in support, outlined the case for an objective approach:

> The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. . . .
>
> . . . The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind,

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[47] ACLU Brief at 12-13.

[48] *Painten*, 389 U.S. at 561. At oral argument, several members of the Court expressed concern regarding whether the district judge had addressed and resolved whether the officers' entry into the premises might have been supportable on a consent theory. Further, the record of the state court trial—although considered by the district judge—had not been made a part of the record before the court of appeals and thus was not before the Supreme Court.

[49] *Id.*

[50] Justice Fortas disagreed with the dissenters' proposal for developing the record all members of the Court agreed was required for it to reach the merits of the case. He stressed, however, that he did not disagree with the dissenters' view that that "the court below erred in relying on its inferences as to the undisclosed intent of the officers." *Id.* at 562 (Fortas, J., concurring).

> but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements.[51]

Justice White then, in words that have become almost a mantra for those opposing subjective standards, commented, "In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[52]

Some discussions after *Painten* continued to uncritically assume that at least some Fourth Amendment standards had a subjective component. In *Hill v. California*,[53] for example, the Court left undisturbed the state court's conclusion that officers reasonably arrested one Miller.[54] That conclusion was described as based on a finding that the officers "had a reasonable, good faith belief" that Miller was in fact Hill, whom they had probable cause to believe committed an offense. The Court noted—and in fact stressed—the state trial judge's finding that the officer "acted in the good-faith belief that Miller was in fact Hill."[55]

Nevertheless, *Painten* made clear that when that assumption was challenged, the propriety of subjective components generally lacked spirited and principled defense. It also provided Fourth Amendment jurisprudence with Justice White's colorful assertion—unsupported by authority or reasoning—that application of subjective criteria would be too difficult and costly to be practical.

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[51] *Id.* at 564-65 (White, J., dissenting).

[52] *Id.* at 565.

[53] 401 U.S. 797 (1971).

[54] *Id.* at 802.

[55] *Id.*

D. *Formulation of the Objective Approach:* Robinson *and* Scott

In retrospect, *United States v. Robinson*[56] and *Gustafson v. Florida*,[57] both decided in 1973, were—or, more accurately, were to become under *Frank Scott v. United States*[58]—the pivotal Supreme Court discussions regarding the significance of officers' states of mind in substantive Fourth Amendment analysis. Both *Robinson* and *Gustafson* involved searches after arrests for driving without a license.[59] As the Court disposed of them, *Robinson* was the case of major significance.

At issue in *Robinson* was the reasonableness of a search incident to an arrest for driving after revocation of one's driver's license.[60] Review was apparently granted to consider and ultimately to reverse the holding below that an arrest for this offense would not support an incidental search.[61] Robinson argued that where no basis for anticipating the discovery of weapons existed, an officer making an arrest could initially make only a frisk.[62] The officer could search more extensively if, but only if, on the basis of the frisk the officer reasonably believed a weapon was present.[63] He stressed that the officer did not actually fear for his safety from Robinson,[64] apparently as a basis for arguing that on the facts of the case itself a frisk could not have developed into a more intrusive search. He simply assumed that if the Court imposed any limitation upon an officer's ability to conduct more than a patdown, this limitation would require an actual subjective belief that a weapon was present and an objectively-sufficient basis for that belief.[65]

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[56] 414 U.S. 218 (1973).

[57] 414 U.S. 260 (1973).

[58] 436 U.S. 128 (1978).

[59] *Robinson*, 414 U.S. at 220; *Gustafson*, 414 U.S. at 261.

[60] 414 U.S. at 220.

[61] *Id.* at 220, 237. In both cases, the argument was for a rule that would apply only to cases in which upon arrival at the stationhouse the suspect was likely to be released—probably pursuant to bail set on the basis of a schedule—without being introduced into the general jail population or even presented before a magistrate. *See Gustafson*, 414 U.S. at 263. Neither opinion of the Court made clear that the rule the Court was rejecting might well not apply to arrests for more serious crimes where that arrest was likely or certain to result in extended detention after arrival at the stationhouse and placement of the suspect in the jail population.

[62] Brief for the Respondents at 9, *Robinson*, 414 U.S. 218 (No. 72-936).

[63] *Id.*

[64] *Id.* at 7.

The Government argued that the Fourth Amendment permitted a full search simply as a consequence of a custodial arrest.[66] It never contended that *if* some case-specific objective basis for a search was required, the officer need not have been actually motivated by the supporting rationale. It did not argue that if the Court required information on which a reasonable officer would believe a weapon present, it should not require in addition that the officer actually believe there was a weapon and act on the basis of that subjective belief.

None of the submissions to the Court focused on whether, if a search after arrest required some objective basis for believing the suspect had weapons or evidence, the Fourth Amendment also required that the officer have subjectively believed this to be the case.[67] In fact, that issue was totally ignored in the rather complicated briefings.

Deciding *Robinson*, the Court made clear that a search incident to arrest is reasonable for Fourth Amendment purposes because of the need for officers to discover and seize weapons as well as to locate evidence or fruits of crime.[68] Therefore, even an arrest for an offense almost certainly not evidenced by items on the suspect's person was nevertheless within the rationale of the rule. The Court also, however, indicated that the search of Robinson was reasonable although the searching officer did not in fact suspect that Robinson was armed[69]—or, apparently, in possession of evidence.

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[65] *Id.*

[66] Brief for the United States at 9, *Robinson*, 414 U.S. 218 (No. 72-936).

[67] The American Civil Liberties Union, as amicus curiae, essentially supported Robinson's position. Brief of the American Civil Liberties Union, Amicus Curiae at 9, *Robinson*, 414 U.S. 218 (No. 72-936) ("a warrantless search for weapons incident to an arrest for a traffic infraction should not be permitted absent special facts or circumstances which lead the officer to reasonably conclude that the individual with whom he is dealing is armed and dangerous").

[68] 414 U.S. at 235.

[69] 414 U.S. at 236 ("[I]t is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respon-

This result was reached only after an intervening conclusion that the Fourth Amendment does not require the litigation in each case of whether or not there the case-specific facts actually invoked the rationale for the rule establishing the reasonableness of such searches. Since officers should not be forced to make the quick and difficult decisions whether and how to search an arrested suspect with knowledge that courts will later second guess their decisions, the reasonableness of a search incident to an arrest is established by a showing that a reasonable arrest occurred and the search was in fact incident to it.[70]

Why did the officer not need to have a subject fear of harm or a subjective belief that Robinson had a weapon? The Court explained only that this was the case "[s]ince it is the fact of custodial arrest which gives rise to the authority to search."[71] This explanation was not developed further.

The Court did not, then, distinguish between, first, a possible objective requirement that grounds exist that would support a belief that the suspect is dangerous or in possession of evidence and, second, a possible subjective requirement that the officer in fact form a belief regarding these matters. It assumed, quite reasonably, that no requirement of a subjective belief would be conceivable unless the objective requirement was imposed. Since no objective requirement was imposed, it found no need to consider whether, in addition, a subjective inquiry was necessary.

Robinson's significance for Fourth Amendment law generally was discovered five years later in *Frank Scott v. United*

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dent was armed."). The Government had not specifically argued that no inquiry into the officer's subjective perception or beliefs was necessary. It did, however, note that the officer had testified he had followed a departmental regulation mandating a search in the situation presented, and contended to the Court that the regulation was "reasonable in scope and proper in purpose." Brief for the United States at 33-37, *Robinson*, 414 U.S. 218 (No. 72-936).

[70] 414 U.S. at 235.

[71] *Id.* at 236.

States,[72] decided under the federal "wiretap" statute. Officers executing a court order issued under the statute are obligated to minimize the interception of protected communications beyond the scope of the order.[73] Under the facts accepted by the Court, the officers in *Frank Scott* had made no effort to avoid complete interception of all communications to which they had access and thus arguably ignored the requirement of minimization.[74] Yet they actually intercepted no communications which they would not have been able to intercept had they in fact been "minimizing."[75] Did the officers' "bad faith" render their actions in violation of the statute and thus require exclusion of the fruits?[76]

The Court itself characterized Scott's position as that the Government's elaborate analysis of transcriptions of the intercepted calls was an inappropriate basis for analysis "having been prepared after the fact by a Government attorney and using terminology and categories which were not indicative of the agents' thinking at the time of the interceptions. As a result, it does not reflect the perceptions and mental state of the agents who actually conducted the wiretap."[77]

Scott contended that the language of the statute required exclusion of all intercepted communications if the interception was conducted in noncompliance with the court order.[78] No link between a particular interception and that noncompliance was necessary. He also argued rigorously for a standard of reasonableness that turned in whole or at least in part on subjective good faith.[79] In support, he explained:

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[72] 436 U.S. 128 (1978).

[73] 18 U.S.C. § 2518(5).

[74] 436 U.S. at 132.

[75] *Id.* at 134.

[76] Apparently there was no effort in the trial court to explicitly inquire whether the officers were in the process of preparing an approach to minimizing. The supervising officer testified that the officers operated "on the understanding that they were to terminate the interception of any particular conversation if and when they determined that it was not properly interceptable." Brief for the United States at 10, *Frank Scott*, 436 U.S. 128 (No. 76-6767). But "when [the supervising officer] was asked whether he could 'point to any discretion exercised by any agent at any time that resulted in the non-recordation . . . as to what was overheard,' he responded that he could not." *Id.* at 10-11 (citing Appendix p. 131). Arguably the record showed only that the officers had not finished formulating a system for identifying calls not covered by the description and thus for actually terminating any calls.

[77] 436 U.S. at 135.

> Any rule primarily concerned with police deterrence must make its results turn on the intention of the police at the time they acted and the reasonableness of their perceptions and actions in light of the facts known to them; the model rewards reasonable good faith efforts and punishes those which are in bad faith or are unreasonable. This need to examine the conduct of the police in light of their intention and the facts known to them applies with equal force under [the statute at issue here]. Under Fourth Amendment deterrent rationale and [the statute], after-the-fact analysis of the results of police conduct is irrelevant if the officers failed in bad faith in execution of their responsibilities or acted unreasonably.[80]

Conceptually, he added, a Fourth Amendment standard of the sort at issue necessarily requires both subjective and objective components: "Absent good faith efforts at compliance with minimization requirements, it is impossible to assess the objective reasonableness of the agents' conduct."[81]

The Government acknowledged that the subjective or objective nature of criterion for determining the Fourth Amendment reasonableness of a search "is not one that this Court appears to have explored at length in any of its decisions."[82] It cited *Robinson* and language in *Terry v. Ohio*[83] as supporting the wisdom of an objective approach.[84] An objective standard, it

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[78] Brief of Petitioners at 22, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

[79] *Id.* at 22-23.

[80] *Id.* at 22-23, 31.

[81] Petitioners Reply Brief on the Merits at 4, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

[82] Brief for the United States at 28, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

[83] 392 U.S. 1, 21-22 (1966).

[84] The brief quoted from *Terry*:

> [I]t is imperative that the facts be judged against an objective stan-

continued, is supported by sound policy:

> The focus of the courts on actions rather than thoughts reflects considerations both of justice and practicality. . . . [A]n individual's right to be free from unreasonable official invasions of privacy are best secured by considering whether or not the invasion is justified by the facts and circumstances known to the officer. . . .
>
> The practical considerations include the difficulty to which Mr. Justice White alluded [in *Painten*] of reliably ascertaining subjective intent (something we hereafter contend the district court failed to do in the instant case), particularly in the absence of objective facts evidencing illegality. Where the action in question (here, intercepting conversations) is the product of human decision made in relation to particular existing circumstances, it is rarely possible to conclude with assurance what decision would have been made in other circumstances.[85]

In deciding the case, the Court quite uncritically concluded—or rather assumed—that the statute was intended to coincide with Fourth Amendment requirements. Thus, the issue before it was informed and perhaps controlled by whether subjective bad faith renders law enforcement conduct unreasonable in Fourth Amendment terms. The "existence *vel non*" of a constitutional or statutory violation, the Court explained in response, "turns on an objective assessment of the officer's ac-

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> dard . . . . [S]imple " 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio, [379 U.S. 89] at 97. *See also* Henry v. United States, 361 U.S. 98; [Anthony G.] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 373 (1974).

Brief for the United States at 28, *Frank Scott*, 436 U.S. 128 (No. 76-6767). This ignored that the *Terry* discussion spoke approvingly of the need to address the objective reasonableness of officers' actions only after commenting that good faith *alone* is not enough. *Id.* at 31.

[85] Brief for the United States at 31, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

tions in light of the facts and circumstances confronting him at the time."[86]

Frank Scott thus apparently endorsed the Government's contention, as stated by the Court, that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[87] Apparently it meant that the same would be the result upon a showing of a lack of "[s]ubjective intent."

The Court offered no reasoning whatsoever in support of its conclusion. The only authority cited in support was *Robinson*. The Court asserted that in *Robinson* it had "held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[88]

To the extent that subjective factors may play a role in the overall Fourth Amendment scheme, as *Frank Scott* suggested, this role would be in addressing the procedural—that is, exclusionary—consequences of a determination that law enforcement conduct was unreasonable under substantive Fourth Amendment law. "[C]onsideration of official motives," the Court commented almost offhandedly, "may play some part in determining whether application of an exclusionary rule is appropriate *after* a statutory or constitutional violation has been established."[89]

Frank Scott simply misrepresented what *Robinson* held. This is evident from the meaning of the critical statement, "the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action." The legal justification for a search incident to arrest is, under *Robinson*, simply the fact of the arrest. "[T]he state of mind which is hypothecated by the reasons" for this justification would be the officer's awareness that he had arrested the searched person.

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[86] 436 U.S. at 136.
[87] *Id.*
[88] *Id.* at 138.
[89] *Id.* at 136.

If *Robinson* had held that a search incident to an arrest requires a reasonable basis for suspicion that the arrestee has on his person weapons or destructible evidence, the situation would have been different. Then, the legal justification for the action would be this reasonable suspicion. The state of mind hypothecated by the reasons for this justification would be something like a subjective belief (or suspicion) that the person does (or may) have such weapons or evidence which would be revealed by the search.

Despite the arguably narrow issues actually decided in *Robinson* and *Frank Scott*, the Court's discussions left no doubt that it disfavored subjective components at least for purposes of determining whether the Fourth Amendment applied to particular law enforcement activity and whether activity covered by the Amendment was reasonable. Without making clear how subjective considerations might be conceptually relevant to any Fourth Amendment issues, *Frank Scott* suggested such relevance would most likely be to matters addressing whether unreasonable law enforcement action rendered inadmissible evidence later acquired by law enforcement.

E. Mixed Signals: Frank Scott *to* Whren

Between *Frank Scott* and *Whren*, the Court's treatment of officers' states of mind as a factor in Fourth Amendment litigation differed. *Scott* suggested that motivation might more appropriately be considered on exclusionary sanction matters rather than as a part of substantive Fourth Amendment analysis, and thus the Court's treatment of the two types of cases might best be considered separately. However, one decision—*Florida v. Royer*[90]—stands out and needs to be first discussed separately.

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[90] 460 U.S. 491 (1983).

1. *Florida v. Royer*: Officers' Characterization Not Controlling

Royer is by general consensus a major development of Fourth Amendment analysis, even though the Court issued only a plurality opinion. Although it is widely used for its identification of detentions that require probable cause, it also made a major contribution to the development of objective Fourth Amendment standards.

Officers approached Royer in an airport and their interaction with him was characterized—by the plurality at least—as developing first into a seizure requiring only reasonable suspicion but then into one that for constitutional purposes required probable cause. By the time he provided consent for the search at issue, the detention had become unreasonable and tainted that consent. The plurality reasoned that the detention had become one requiring probable cause and the information possessed by the officers did not rise to that level.

For present purposes, however, what is of major significance is the plurality's treatment of what it viewed as testimony by one of the officers that, at the time Royer gave consent, the officers did not have probable cause: "[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying of Royer's consent to search."[91]

This suggests that the plurality viewed the officers' subjective and contemporaneous characterization of their conduct as irrelevant to its later Fourth Amendment analysis. Even if the officers at the time believed that Royer was never detained or seized, the discussion indicates, the prosecution was free to later support their action as having given rise to a seizure that was supported by facts sufficient to meet the applicable Fourth Amendment standards. To the extent that the prosecution defended the law enforcement officers' actions as a reasonable seizure because it was based on probable cause, it did not need to show that the officers subjectively concluded their information constituted probable cause. It did not need to show that the officers even addressed whether they were detaining the suspect at all. Alternatively, even a showing that the officers subjectively regarded their actions as a seizure based on reasonable suspicion, did not preclude the prosecution from defending their actions as a different type of seizure requiring and supported by probable cause.

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[91] *Id.* at 507.

In fact, the parties neither framed the case in this manner nor even recognized any such issue.[92] Certainly Royer did not argue that, even if the officers were aware of facts amounting to probable cause, the prosecution was precluded from establishing reasonableness on this theory because of the officers' subjective state of mind.

To the extent that *Royer* established that the officers' subjective intentions are irrelevant to determining how the prosecution can later support those actions against Fourth Amendment challenge,[93] that significant determination was a novel one.[94] Also, it was reached without adversary presentations or even identification by the parties.

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[92] The only witnesses to testify were Royer and one of the officers, Johnson. The prosecution elicited negative answers from Johnson as to whether Royer was ever told he was under arrest, and whether Johnson had, "in fact," placed him under arrest. Joint Appendix at 50A-51AA, *Royer*, 460 U.S. 491 (No. 80-2146). Overall, the prosecution's position in the trial court appeared to be that Royer was never seized. It never explicitly asked Johnson how he and the other officer subjectively perceived the situation.

The United States, participating as amicus curiae, contended the court below had erred in determining that the detention had become an arrest in part on the basis of the officers' intent—uncommunicated to Royer—to not permit him to leave. The officers' subjective intentions, it argued, were irrelevant. Even if relevant, their subjective intentions went at most to whether there was a seizure and not to whether the seizure was an arrest for Fourth Amendment purposes. Brief for the United States as Amicus Curiae Supporting Petitioner at 17-18, *Royer*, 460 U.S. 491 (No. 80-2146).

[93] The majority for affirmance included Justice Brennan andthe four justices joining Justice White's plurality opinion. Justice Brennan concurred in the result on the ground that the record supported the state court's conclusion that Royer's seizure "matured into an arrest unsupported by probable cause." *Royer*, 460 U.S. at 509 (Brennan, J., concurring in the result). He identified numerous ways in which he disagreed with the plurality's analysis, but he did not mention the plurality's assumption that the prosecution was free to support the officers' actions without regard to how the officers subjectively perceived it at the time.

[94] In support of its statement the plurality cited only *Peters v. New York*, 392

2. Exclusionary Sanction Considerations

Frank Scott's suggestion that officers' motives might appropriately be considered in determining whether an exclusionary penalty is properly attached to a violation of substantive Fourth Amendment requirements was followed with mixed results. In 1984, the Court addressed two major possible exceptions to the federal constitutional exclusionary rules. These cases, considering the most pervasive modifications of exclusionary sanction law, seemed most likely to add subjective components to federal search and seizure law as *Frank Scott* suggested would be appropriate. In fact, however, this was not the case.

a. Inevitable Discovery

In *Nix v. Williams*,[95] decided early in the 1984 term, the Court embraced an inevitable discovery exception to all or most federal constitutional exclusionary rules. In doing so, however, it explicitly rejected a requirement that the officers have acted in "good faith."

A good faith requirement, the Court reasoned in *Nix*, would add little to the deterrent impact of the exclusionary penalty. Seldom will officers be able to anticipate the inevitable discovery of evidence they are seeking, but when they do they have considerable disincentives to exploit that knowledge by taking unconstitutional "shortcuts" to accelerate their access to the evidence. In any case, the "enormous societal cost" of excluding evidence simply because the officers acted in bad faith reliance on the inevitable discovery rule far outweighs whatev-

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U.S. 40, 66-67 (1968). *Peters*, however, held only that the state appellate court's holding that the detention as issue was legal under the state's "stop and frisk" statute did not preclude the prosecution from defending the seizure as an arrest based on probable cause before the Supreme Court. This is a much different matter.

[95] 467 U.S. 431 (1984).

er deterrence value a good faith requirement might have.[96]

In *Nix*, the court below had both assumed the requirement of good faith and explicitly defined it as subjective in nature.[97] Before the Supreme Court, the petitioner argued that the subjective approach applied by the court of appeals would mean that cases would turn on the "elusive state of mind of law enforcement officers."[98] Respondent Williams did not defend the lower court's approach. Rather, he argued that if the Court imposed a requirement of good faith, it should be an objective one.[99]

The matter was addressed at somewhat more length by the United States as amicus curiae. Any good faith requirement adopted by the Court, the United States argued, should focus on the objective reasonableness of the officers' actions rather than on their "subjective intent." The task of probing officers' minds would be "time consuming," "unwieldy," and "awkward." It relied heavily upon the Court's then-recent decision in *Harlow v. Fitzgerald*,[100] which eliminated the previous subjective aspect of the standard for qualified immunity.[101]

As a bottom line, however, no case for a subjective good faith requirement was put before the Court.

b. "Good Faith"

Near the end of the 1983 term the Court addressed a proposed "good faith" exception to the federal constitutional exclusionary requirements. Whether any such exception should have a subjective component was a matter with which the Court was familiar.

The Court had ordered argument on the possible exception in *Illinois v. Gates*,[102] although the issue had not been raised in the lower courts. Respondent Gates argued in part that the lack of a record on the matter militated against addressing the issue, particularly since the submissions favoring an exception were divided on "whether subjective state-of-mind determinations, objective conditions, or both are appropriate standards."[103] Ultimately, the Court declined to address the matter in *Gates*, pointing specifically to the lack of anything in the record "regarding the subjective good faith of the police officers."[104] This, it commented, "might well be an important consideration in determining whether to fashion a good faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing such facts. "[105]

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[96] *Id.* at 445-46.

[97] Williams v. Nix, 700 F.2d 1164, 1170-71 (8th Cir. 1983) ("The relevant question—bad faith—is subjective.").

[98] Petitioner's Brief at 20-21, *Nix*, 467 U.S. 431 (No. 82-1651).

[99] Brief of the Respondent at 23, *Nix*, 467 U.S. 431 (No. 82-1651).

[100] 457 U.S. 800 (1982).

[101] Brief for the United States as Amicus Curiae Supporting Petitioner at 26-27, *Nix*, 467 U.S. 431 (No. 82-1651).

After *Gates*, the Court granted review in three cases for purposes of addressing the issue left open in *Gates*. It adopted a limited exception in *United States v. Leon*,[106] removing the exclusionary penalty upon a showing that the officers had obtained a warrant.

The case for the exception was made most effectively by the United States, first in *Gates* on reargument, and again in *Leon*. The briefs referred to the lack of any rationale "for faulting an officer who has made a reasonable but incorrect assessment [of a situation]."[107] Generally, the briefs discussed the matter as if the United States were urging an exception with both subjective and objective components. In *Gates*, however, the brief indicated the standard should probably be only objective.[108] In the *Leon* brief, the United States explicitly urged an objective approach. To reflect this, the *Leon* brief called the doctrine it urged a "'reasonable mistake' exception." It explained that it chose this terminology to avoid the "good faith" phraseology that suggested the officers' intentions were relevant.[109]

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[102] 462 U.S. 213 (1983).

[103] Brief of Respondent on Reargument,at 11, *Gates*, 462 U.S. 213 (No. 81-430).

[104] *Gates*, 462 U.S. at 221.

[105] *Id.* The issue had been briefed by one of the parties and amicus in *Taylor v. Alabama*, 457 U.S. 687 (1982), but the Court did not reach or even mention it. Both proponents of an exception in *Taylor* assumed that the exception would have both a subjective and an objective component. Brief for Respondent at 13-21, *Taylor*, 457 U.S. 687 (No. 81-5152); Brief of Americans for Effective Law Enforcement, Inc., *et al* as Amici Curiae Supporting Respondent at 10-21, *Taylor*, 457 U.S. 687 (No. 81-5152).

[106] 468 U.S. 897 (1984).

[107] Brief for the United States at 51, 57, *Leon*, 468 U.S. 897 (No. 82-1771) (asserting no policies are served by excluding evidence "when law enforcement officers . . . reasonably attempt to navigate the intricate channels of Fourth Amendment law"); *accord* Brief for the United States as Amicus Curiae at 30, *Gates*, 462 U.S. 213 (No. 81-430).

The United States indirectly supported this aspect of its proposal on the ground that a purely objective standard would remove the necessity for courts "to engage in unwieldy and awkward inquiries into the subjective intent of . . . officers" and consequently the exception would not likely unduly burden the courts.[110] Omitting a subjective component, it added, would be unlikely to alter the outcome of particular cases on many occasions, because seldom would a reasonable officer not have known the action was improper but the particular officer did in fact know this. Nevertheless, even in *Leon*, the United States stopped short of urging a totally unqualified objective approach:

> It is possible . . . to imagine cases in which the objective reasonableness of a belief in the legality of particular conduct could be overcome by a showing that, for example, the victim of the search was singled out for harassment. In such strictly limited circumstances, a subjective inquiry might be appropriate. Plainly, no such circumstances are present in the cases now before the Court.[111]

In *Leon*, as earlier in *Gates*, the United States relied upon the Court's 1982 decision in *Harlow v. Fitzgerald*.[112] *Harlow* held that the standard for determining whether a defendant sued for civil damages under federal law for actions taken in an official capacity had qualified immunity was purely objective.[113] Thus a plaintiff could no longer defeat a claim of qualified immunity by allegation and proof that the defendant actually knew the action the defendant took violated the constitutional rights of the plaintiff. The plaintiff was required to show that the defendant should have known this.[114] The Court explained that "substantial costs attend the litigation of the subjective good faith of government officials," and noted that with regard to "questions of subjective intent, . . . there often is no clear end to the relevant evidence."[115]

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[108] Brief for the United States as Amicus Curiae at 58 n.39, *Gates*, 462 U.S. 213 (No. 81-430).

[109] Brief for the United States 53 n.19, *Leon*, 468 U.S. 897 (No. 82-1771).

[110] *Id.* at 80-81; *accord*, Brief for the United States as Amicus Curiae at 58-59, *Gates*, 462 U.S. 213 (No. 81-430).

[111] *Id.* at 81 n.47.

[112] 457 U.S. 800 (1982). In *Gates*, the United States described the *Harlow* result as reached "for reasons only partly applicable in the present context." Brief for the United States as Amicus Curiae at 58 n.39. *Gates*, 462 U.S. 213 (No. 81-

Respondent Leon acknowledged that the proposed objective approach was "doctrinally attractive" but argued it was "not workable or logically coherent."[116] All officers who do not subjectively believe their conduct proper can be deterred. He suggested that courts would recognize this and either create exceptions to any purely objective standard or simply examine actual intent despite formal doctrine.[117] "[A] subjective inquiry is inherent to a good faith exception and simply unavoidable," he argued. This meant the objective proposal "would present impossible problems of proof,"[118] including the need to rely on "self-serving, untrustworthy, and generally uncontradicted

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430). By the time *Leon* had been decided, this qualification had been eliminated.

[113] 457 U.S. at 819.

[114] *Id.* at 815-818.

[115] *Id.* at 816-17. *Harlow's* applicability was at best questionable. *Harlow* found the litigation costs it emphasized controlling because of several aspects of the type of litigation at issue. Civil litigation of the sort under scrutiny involved extensive discovery by deposition, a fact that the Court stressed. Since the defendants were often governmental officials, litigation costs impaired their continued ability to perform their functions. Perhaps most significantly, the nature of subjective issues tended to prevent resolution of these lawsuits on summary judgment and thus interfered with the Court's efforts to give such defendants considerable leeway in minimizing litigation costs by obtaining summary judgment in nonmeritorious cases.

[116] Brief for Respondentat 31, *Leon*, 468 U.S. 897 (No. 82-1771).

[117] *Id.* at 34-35.

[118] *Id.* at 36.

police testimony."[119]

During oral argument in *Leon* and its companion case, the only references to the subjective-objective issue were two summary mentions of it by counsel for *Leon* in his opening and closing remarks.[120] No questions from the justices inquired about this aspect of the proposed exception.

In its *Leon* decision, the Court acknowledged it had granted review to determine whether a good faith exception should be recognized,[121] and in fact sometimes described the position of law it adopted as a good faith exception.[122] It did not adopt the terminology carefully formulated by the United States. Nevertheless, the Court explicitly asserted that the exception it adopted had no subjective component and required only that the officers have acted in an objectively reasonable manner.[123] In a footnote to a textual discussion of "the officer's reliance" on the issuing magistrate, the Court made clear that actual subjective reliance was not necessary or even relevant. The "good faith inquiry," it explained, "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[124] Why? Despite *Frank Scott's* reference to the role of motivation in exclusionary penalty analysis, it relied upon Justice White's *Painten* warning that "sending . . . courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[125]

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[119] *Id.* at 37.

[120] Transcript of Oral Argument at 22, 35, *Leon*, 468 U.S. 897 (No. 82-1771) (noting that the rationale for the exception assumes actual good faith but proponents purport to offer an objective test and that omitting a subjective component will not work "because the premise of petitioner's argument is that the individual is acting in good faith").

[121] 468 U.S. at 905 (quoting Petition for Certiorari).

[122] *Id.* at 924 n.25 (referring to "the good-faith exception we adopt today").

[123] *Id.* at 919 n.20 (requirement of objective reasonableness responds to objections that the exception "will turn on the subjective good faith of individual officers").

[124] *Id.* at 922 n.23.

[125] *Id.* at 922 n.23 (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)). This aspect of *Leon* caused some consternation. Bernie v.

Despite the indications from *Gates* that officers' subjective states of mind would be significant in "good faith" analysis, *Leon* rejected that possibility with no discussion of the possible conceptual value a subjective component might have. Whatever value the Court may have seen in Leon's argument that the general Fourth Amendment scheme argued in favor of a subjective component, it apparently found the anticipated costs of administering a test with such an element as outweighing that value.

State, 524 So. 2d 988, 996 (Fla. 1988) (Kogan, J., concurring in part and dissenting in part) ("It is unclear how an inherently subjective concept such as good faith can be measured objectively."). The answer, of course, is that *Leon's* exception simply is not a "good faith" exception in any meaningful sense of that term. As the California Supreme Court has recognized, the good faith term is simply misleading. People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994).

Leon's judgment that the exception could not practically include a subjective element has not been obvious to others. The broad exception recognized by the Fifth Circuit prior to *Leon*, for example, clearly includes a subjective requirement of actual good faith. United States v. Williams, 622 F.2d 830, 841 n.4a (5th Cir. 1980). *See also* Creamer v. Porter, 754 F.2d 1311, 1317 n.5 (5th Cir. 1985).

The Court may have anticipated addressing the subjective-objective distinction in more detail in deciding *People v. Quintero*, 657 P.2d 948 (Colo. 1983), *cert. granted*, 463 U.S. 1206 (1983), *and cert. dismissed*, 464 U.S. 1014 (1983). *Quintero* involved Colorado's statutory good faith exception, which appeared at the time to include a subjective requirement. This was later proved true. People v. Leftwich, 869 P.2d 1260, 1271 (Col. 1994). Review was dismissed in *Quintero*, however, when respondent Quintero died. 464 U.S. 1014 (1983).

When *Leon* was expanded in *Illinois v. Krull*, 480 U.S. 340 (1987), to cover warrantless police action authorized by an unconstitutional statute, the Court continued to speak generally of a requirement of "good faith reliance," suggesting a demand of actual and thus subjective reliance. In addition, however, it carefully reaffirmed the Court's determination in *Leon* that the standard of reasonableness—and presumably the application of the exception—"does not turn on the subjective good faith of individual officers." *Id.* at 355.

This confusion in *Krull* between the standard of reasonableness—inherently objective, of course—and a possible underlying requirement of actual—and thus inherently subjective—reliance on the statute or warrant seems to have eluded the Court. Perhaps the seeming confusion was intentional. By posing the question as whether the requirement of reasonableness has a subjective component, the Court was avoiding the much more difficult question of how reliance could be defined without such a subjective component. *Leon*, at least, acknowledged that the issue was the content of the "good-faith inquiry," not of the requirement of reasonableness. 468 U.S. at 922 n.23.

c. *Attenuation of Taint*

Despite these rejections of subjective components to the two exceptions to the exclusionary requirement, the Court did somewhat develop subjective components of several other aspects of Fourth Amendment exclusionary sanction law.

The vague exception to exclusionary requirements for situations in which the "taint" of the constitutional violation is "attenuated" was developed so as to permit consideration of officers' motivation. The leading cases,[126] decided between 1975 and 1980, established that whether the link between a constitutional violation and actual discovery of evidence is such as to attenuate the taint of the violation depends on a totality of the circumstances analysis. *Brown v. Illinois*,[127] however, made clear that "the purpose . . . of the official misconduct" is relevant and—along with the "flagrancy" of that misconduct—is of "particular[]" significance.[128] Thus, it is significant whether the violation rose to the level of "conscious" misconduct[129] and whether the officers actually—and subjectively—intended to find evidence of the sort actually found and at issue in the litigation.[130]

The attenuation of taint cases reflect none of the misgiving evident in *Leon* regarding the difficulty of inquiry into officers' subjective states of mind. Of course, the totality of the circumstances nature of the analysis means that such difficulty should seldom or never actually frustrate analysis; if the officer's state of mind proves elusive, the totality contains many other circumstances that can be explored and used in resolving the issue. Use of officers' subjective state of mind is *permitted* but not *required* by the Fourth Amendment standard.

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[126] Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975).

[127] 422 U.S. 590.

[128] *Id.* at 603-04.

[129] *Rawlings*, 448 U.S. at 110.

[130] *Ceccolini*, 435 U.S. at 279-80 ("not the slightest evidence to suggest" that officer made search with intent of locating a witness). *But see* Taylor v. Alabama, 457 U.S. 687, 693 (1982) (noting officers took improperly detained suspect to stationhouse "for interrogation in the hope that something would turn up").

One court has questionably held that, despite *Whren*, a suspect's fingerprints can be the excludable "fruit" of an unlawful arrest only if the officers were subjectively motivated by a desire to obtain fingerprints in making the arrest. United States v. Ortiz-Gonzalbo, 946 F. Supp. 287, 289-90 (S.D.N.Y. 1996). Perhaps in such situations, the absence of a subjective desire to obtain fingerprints is more accurately characterized as a factor, perhaps a major one, suggesting that the taint of the arrest was attenuated by the time the officers acquired the fingerprints.

d. Independent Source

Even greater weight was given to officers' subjective state of mind in the Court's application of what is often characterized as the "independent source" rule. Whether challenged evidence was tainted by earlier police activity violating the Fourth Amendment—whether it is potentially excludable "fruit of the poisonous tree"—is determined by first inquiring whether there is a causal relationship between that activity and the obtaining of the evidence. If there is not, the evidence has an "independent source" and is clearly untainted by the law enforcement impropriety. In *Murray v. United States*,[131] the Court made clear that the casual relationship necessary to avoid the independent source problem would exist if officers were subjectively motivated to take action supportable on independent grounds by the results of the earlier impropriety.[132]

Murray opposed a subjective approach. This, however, was only because he favored a broader rule that would require suppression of all evidence observed by officers during an initial and unreasonable search, whether or not there was proof that this influenced the officers in deciding to make the later search that resulted in the actual seizure of that evidence.

At oral argument, the United States accepted the burden of proving that the decision of the officers to proceed legitimately (in this case with a warrant) was independent of anything learned during the earlier and unreasonable search.[133] It depreciated a suggestion from one member of the Court that it would seldom fail in this task because the defense could not effectively contest testimony by the officers regarding their intentions.[134] Murray, in contrast, suggested that if an intent to obtain a warrant rendered admissible evidence observed in an unreasonable entry, officers would falsely testify with impunity that they had this intent.[135]

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[131] 487 U.S. 533 (1988).

[132] *Id.* at 541-42.

[133] Transcript of Oral Argument at 21-22, *Murray*, 487 U.S. 533 (No. 86-995).

In any case, the Court in disposing of the case evidenced no misgivings that so applying the "fruits" doctrine would require a subjective inquiry. There is general agreement that, as so applied, the doctrine's inquiry is subjective.[136]

Arguably the nature of the factual causation requirement underlying the independent source doctrine conceptually required that the officers' subjective motivation be given its full logical significance in such cases, and thus *Murray* presented the Court with no real choice. Yet, *Leon's* development of a purely objective "good faith" doctrine does nearly equal violence to the widely-accepted conceptual nature of "good faith," and this did not trouble the Court. Moreover, the Court could well have reasoned in *Murray* as it has elsewhere that if the causal link between the illegal activity and the obtaining of the challenged evidence is only one of motivation, the challenged evidence may be characterized as not obtained by "exploitation" of the earlier illegal activity.[137]

3. Substantive Fourth Amendment Law

The Court's treatment of officers' motivation on substantive Fourth Amendment issues between *Frank Scott* and *Whren* was, like its treatment of this consideration on exclusionary sanction matters, considerably varied. Like the attenuation of taint and independent source discussions, the Court's treatment of officers' motivation in these substantive areas did not focus upon the subjective aspects of the factors.

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[134] *Id.* at 34.

[135] *Id.* at 11-12.

[136] United States v. Restrepo, 966 F.2d 964, 972 (5th Cir. 1992); State v. Lange, 463 N.W.2d 390, 391-92 (Wis. Ct. App. 1990).

[137] New York v. Harris, 495 U.S. 14, 19 (1990) (confession obtained from suspect removed from premises after unreasonable entry of premises to make arrest of suspect "was not an exploitation of the illegal entry" and hence was admissible). Although *Harris* is not entirely clear, its rule seems to be that the necessary "exploitation" may be lacking even if "but for" factual causation is present.

a. Misrepresentations in Warrant Affidavit

Frank Scott's insight that *Robinson* signaled disapproval of subjective criteria in Fourth Amendment analysis apparently escaped the Court later in 1978,[138] when in *Franks v. Delaware*[139] it recognized a Fourth Amendment right on the part of defendants to challenge warrant affidavits as factually inaccurate. *Franks* held that a defendant was entitled to prevail in such an attack only on proof—among other matters—that the affiant had made the false statement with at least "reckless disregard for the truth."[140] The *Franks* criterion almost certainly includes a subjective component,[141] but the discussion suggests this was adopted offhandedly and with no careful decision to override a strong policy against subjective considerations in Fourth Amendment law.[142] The opinion does not acknowledge even the possibility of tension between its analysis and the *Frank Scott-Robinson* discussion written earlier the same term.

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[138] Between *Frank Scott* and *Franks*, the Court decided *Michigan v. Tyler*, 436 U.S. 499 (1978), in which it indicated that officials investigating a fire under essentially administrative authority which does not require a traditional search warrant would be subject to the general warrant requirement if they "find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution . . . ." *Id.* at 512. Thus, the need for a traditional search warrant appeared to turn in part at least upon whether the officers were subjectively motivated by a perception that a crime had in fact occurred and that a search was necessary to gather evidence for prosecution. *Tyler's* analysis, however, may not have survived *Michigan v. Clifford*, 464 U.S. 287 (1984), in which a split majority of the Court rejected the earlier decision's approach.

[139] 438 U.S. 154 (1978).

[140] *Id.* at 155-56.

[141] *Franks* failed to flesh out what it meant by a reckless disregard for the truth. Franks had assumed that the definitions of recklessness and negligence in Delaware criminal law would apply. Petitioner's Reply Brief at 6-7, *Franks*, 438 U.S. 154 (No. 77-5176). The United States, in contrast, assumed without discussion that recklessness would mean "without regard for . . . accuracy." Brief for the United States as Amicus Curiae at 29, *Franks*, 438 U.S. 154 (No. 77-5176).

[142] Since the court below had held that no attacks whatsoever were permitted on the face of warrant affidavits, *Franks* did not present the Court with a focused issue regarding the subjective or objective nature of the standard applicable *if* any such attacks were permissible. The Court was obviously concerned that any opportunity to mount such attacks would be abused by defendants at great inconvenience to the nation's trial courts, and the discussion was aimed at setting

This is somewhat surprising, given the submissions. The United States, as amicus supporting a rule permitting challenges to warrant affidavits, argued that sound exclusionary rule policy suggested that defendants be able to raise intentional or reckless errors but not negligent ones. It relied primarily on the proposition that the administrative costs of a rule permitting challenge on negligent errors would be excessive. Negligence is a "subjective and slippery" concept, and inquiry into whether officers were negligent or "completely innocent" would involve "elaborate evidentiary hearings" that would seldom provide "satisfactory results."[143] Franks argued that defendants should be permitted to rely on even negligent misstatements. The line between innocence and negligence is clearer than that between negligence and recklessness, he contended, and both recklessness and negligence "involve a degree of culpability which is both preventable and deterrable."[144]

b. Scope of Permissible Search Under Warrant

In 1987, the Court again showed little concern regarding subjective considerations when, in *Maryland v. Garrison*,[145] it held that a search of premises beyond the scope of a search warrant was nevertheless sometimes reasonable in Fourth Amendment terms. The key is whether the officers reasonably believed at the time that the place was within the terms of the warrant. Although the Court's discussion stressed the need for objective reasonableness,[146] it is clear that the first and basic

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out standards that would minimize the risk of such abuse. Almost certainly the Court sought to impose a high—and some would argue impossible—burden on defendants seeking to attack an affidavit, and did this in part by incorporating what it viewed as a difficult-to-meet subjective state of mind element.

[143] Brief for the United States as Amicus Curiae at 29, *Franks*, 438 U.S. 154 (No. 77-5176).

[144] Petitioner's Reply Brief at 6-7, *Franks*, 438 U.S. 154 (No. 77-5176).

[145] 480 U.S. 79 (1987).

[146] *Id.* at 87-88.

demand was a showing that the officers in actual subjective fact believed the searched premises to be within the terms of the warrant.[147] The situation, it added, was analogous to that in *Hill v. California*,[148] which held that officers with probable cause to arrest one Hill and who, both reasonably and with a good faith subjectively believed that Miller was Hill, made a reasonable arrest of Miller.

Nothing in *Garrison* suggests discomfort with an initial subjective requirement of actual belief. In fact, the Court's discussion indicates that the Court most likely gave no consideration to the possibility that it should apply a purely objective standard asking whether reasonable officers could have believed the premises searched were within the terms of the warrant.[149]

c. *Pretext Administrative and Inventory Searches*

In several other 1987 cases, the Court, in the course of upholding searches made on less than probable cause, used language suggesting that in situations other than those before the Court, officers' subjective states of mind might affect the reasonableness of such searches.

Discussing an administrative search in *New York v. Burger*,[150] the Court commented that "[i]t is undisputed" that the inspection at issue "was made solely pursuant to the administrative scheme," and thus there was "no reason to believe that the . . . inspection was actually a 'pretext' for obtaining evidence of . . . violation of the penal laws."[151] In the course of upholding an inventory search of a seized automobile in *Colorado v. Bertine*,[152] it noted "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."[153]

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[147] *Id.* at 88 (referring to officer's "failure to realize the overbreadth of the warrant" and posing issue as whether this "was objectively understandable and reasonable"). In stating the case before it, the Court had explicitly stated that at the time of the search in issue, the officer "reasonably believed" that the area being searched contained only one apartment—that described in the warrant—and therefore were in fact unaware that they were in another apartment. *Id.* at 80.

[148] 401 U.S. 797 (1971). *See supra* text accompanying notes 54-55

[149] In one footnote discussion of a particular aspect of the facts, however, the Court did explain its results in terms of what the police "could reasonably have believed." 480 U.S. at 88 n.12 (stating when McWebb unlocked door to third floor of building, "[t]he police could reasonably have believed" he was admitting them to a floor containing only one undivided apartment). This suggests no contemplation that a purely objective approach could conceivably be adequate.

[150] 482 U.S. 691 (1987).

d. Protective Sweeps

In the 1989 term the Court in *Maryland v. Buie*[154] addressed the reasonableness of a protective sweep of premises by officers making an arrest in residential premises. Such a sweep, it held, requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[155] This suggests an objective standard. On remand, however, the Maryland court split on whether the standard was purely objective. A plurality, however, reasoned that it was and thus in complying with the Supreme Court's directive to reconsider the case it was not required to demand that the prosecution prove that the officers involved actually did believe the premises harbored a dangerous individual.[156]

In fact, the issue had been raised before the Supreme Court. Buie had argued that if probable cause was not demanded for a sweep, that action did require that officers have a reasonable and particularized belief that dangerous persons were in the premises.[157] He puzzlingly appeared to misunderstand the implications of his position, however, because he then contended that whether or not the officers actually held a fear that such persons were present was merely "useful" in assessing whether reasonable suspicion existed.[158] From the fact that the officers involved had no such fear, he reasoned, the Court could infer that the circumstances "would not evoke a self-protective motivation in a reasonable mind."[159] He failed to distinguish between useful but not essential evidence and an explicit requirement that a subjective belief be proved.

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[151] *Id.* at 716 n.27.

[152] 479 U.S. 367 (1987).

[153] *Id.* at 372.

[154] 494 U.S. 325 (1990).

[155] *Id.* at 334.

[156] Buie v. State, 580 A.2d 167, 170 (Md. 1990), *cert. denied*, 498 U.S. 1106 (1991).

[157] Brief for Respondent at 13, Buie v. Maryland, 498 U.S. 1106 (1991) (No. 90-6725).

Maryland responded that reasonable suspicion is based on a purely objective standard. Thus, a showing that the officers involved did not have a subjective fear of danger "does not negate the objective basis for determining that the officers were, indeed, at risk."[160]

e. "Plain View" Seizures

Stronger and broader language disfavoring subjective considerations was used in 1990, when in Horton v. California[161] the Court rejected an earlier indication in its case law[162] that a warrantless "plain view" seizure of an item during the execution of a search warrant would be reasonable only if the officers' discovery of the item was "inadvertent." Precisely when discovery of an item would be inadvertent was not clear, as the potential requirement had not been developed. Since the critical question was whether the officer had foreseen the certainty or likelihood of discovery of the item, the inquiry would clearly be in part a subjective one.

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[158] *Id.* at 21.

[159] *Id.*

[160] Reply Brief for Petitioner at 6-7, *Buie*, 498 U.S. 1106 (No. 90-6725). The United States agreed that a sweep required that officers "have a reasonable belief that their security is at risk," Brief for the United States as Amicus Curiae Supporting Petition at 13, *Buie*, 498 U.S. 1106 (No. 90-6725). Without acknowledging the inconsistency, it later argued that the officers' lack of any subjective apprehension does not matter, because the standard is objective. *Id.* at 22-23 n.18. At oral argument, counsel for the United States began by asserting, "a protective sweep is lawful when the police have a reasonable belief that their security is in jeopardy." Transcript of Oral Argument at 20, *Buie*, 498 U.S. 1106 (No. 90-6725). But later, when asked about what the officers in the cases before the Court thought at a particular moment, he responded in more careful terms: "I think . . . what they thought, or in any event what the objective factors would have justified them in thinking." *Id.* at 24.

[161] 496 U.S. 128 (1990).

[162] Coolidge v. New Hampshire, 403 U.S. 443, 469-70 (1971) (opinion of Stewart, J., announcing the judgment).

Refusing to adopt the proffered subjective requirement, *Horton* reasoned primarily that the limitation on seizures is not necessary to assure that judicially-authorized searches are adequately limited.[163] It also, however, paused to depreciate—without development—the proposed requirement because of its subjective nature: "[E]venhanded law enforcement is best achieved by objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[164]

Respondent California did argue that the inadvertence requirement was inconsistent with *Frank Scott* and the objective approach reflected by that decision.[165] Petitioner Horton assumed that the inadvertence requirement was subjective in nature,[166] but made no effort to defend it against attacks based on that subjectivity.

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[163] 496 U.S. at 139-40.

[164] *Id.* at 138. Since the Fourth Amendment explicitly provides that "no Warrants shall issue, but . . . particularly describing . . . the . . . things to be seized," it is arguable that by its terms the provision mandates a subjective rule—a warrant must describe those items the officer executing the warrant intends to seize. Whatever its appeal elsewhere, literalism in reading the Fourth Amendment seems to have little appeal where the framers used language suggesting a subjective approach.

Professor Colb has treated *Horton* as resting on the difficulty of determining officers' subjective intentions. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1491 n.87 (1996). This seems inaccurate, and perhaps *Horton* is most significant because of the Court's reliance upon the conceptual inappropriateness of a subjective standard rather than the practical difficulty of implementing that approach.

[165] Brief for Respondent, at 20. The United States, supporting the respondent, assumed that an inadvertence requirement would ask whether the offices had probable cause in an objective sense. It did acknowledge that the Court could adopt a subjective approach, but it argued against that on the ground, among others, that "it would likely give rise to litigation over the bona fides of the officer's testimony as to his beliefs, as well as challenges to the reasonableness of those beliefs." Brief for the United States as Amicus Curiae Supporting Respondent at 22 n.8.

[166] *E.g.*, Petitioner's Reply Brief, at 1 ("Where police officers enter a residence with the intent to search for and seize items not described in the warrant, the amendment has been violated.")

f. Consent Issues

The substantive Fourth Amendment rule that a search pursuant to effective consent is reasonable was considered in 1990 and 1991 with both discussion and results that reflected the Court's increasing disapproval of subjective considerations.

In *Illinois v. Rodriguez*,[167] the Court adopted the view that consent from a person in fact lacking authority to consent would sometimes be effective. Its articulation of the standard suggested a purely objective criterion: reliance upon consent renders a search reasonable if "the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the person had sufficient authority over the premises to give effective consent.[168] Whether *Rodriguez* reflected a formal determination that only a reasonable person standard must be met—and that the officer need not have actually and subjectively concluded that the person had authority—was not clear. Arguably, the critical language assumed that a subjective conclusion by the officer had been satisfactorily established or was not contested, and was therefore intended only to make clear that in addition the prosecution was required to establish the objective reasonableness of the officers' conclusion.[169]

The next year, in *Florida v. Jimeno*,[170] the Court turned to the scope of consent and made clear the objective nature of the standard adopted. "The touchstone of the Fourth Amendment is reasonableness," the Court observed.[171] Then—assuming that the matter had been settled by *Rodri-*

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[167] 497 U.S. 177 (1990).

[168] *Id.* at 188.

[169] In the first paragraph of the opinion, Justice Scalia's statement of the issue presented it as whether entry was reasonable if based on consent from a person "whom the police, at the time of the entry, reasonably believe to possess common authority over the premises." *Id.* at 179. Thus the assumption of the discussion was apparently that the proposed criterion would require both that the police have had a belief and that this belief have been objectively reasonable.

[170] 500 U.S. 248 (1991).

[171] *Id.* at 250 (citing Katz v. United States, 389 U.S. 347, 360 (1967)).

guez—it put the issue in such cases as what a "reasonable person [would] have understood by the exchange between the officer and the [consenting person]."[172] Under *Jimeno*, determining the scope of consent apparently requires no inquiry into the actual understanding of the officer but rather turns on what objectively a reasonable person would understand from the words in the context. This conclusion, unnecessary to the resolution of the case, was supported only by the inaccurate assumption that *Rodriguez* somehow established that all or most consent matters turned only on objective criteria.

g. *Scope of a Frisk*

Given the increasing focus on objective criteria, the Court surprisingly appeared to rely on a purely subjective approach in defining the scope of a permissible weapons frisk.

In *Minnesota v. Dickerson*,[173] the question was whether an officer, assumed to have had the right to conduct a weapons search of Dickerson, overstepped his authority when he manipulated a small, hard object he felt in Dickerson's pocket after concluding that the object was not a weapon. Under *Terry v. Ohio*,[174] the Court explained, the search must be "related to" the justification—"the protection of the police officer and others nearby"—and the officer's search of Dickerson exceeded this because it constituted a "continued exploration of [Dickerson's] pocket after having concluded that it contained no weapon."[175] The search became improper, in other words, because the officer subjectively concluded that the object being explored was not a weapon and thus was subjectively motivated by something other than the justification offered for the search.

The choice of terminology in *Dickerson* was almost certainly not accidental. Minnesota argued explicitly that the state court had erred in determining the scope of the search permissible under a subjective standard.[176] Dickerson, in contrast, assumed that the state court had properly used a subjective standard[177] but did not defend that standard on its merits.

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[172] *Id.* at 250-51.

[173] 508 U.S. 366 (1993).

[174] 392 U.S. 1 (1968).

[175] *Dickerson*, 508 U.S. at 378.

[176] Petitioner's Reply Brief on the Merits at 6, *Dickerson*, 508 U.S. 366 (1993)

Yet amazingly the Court offered no defense for, or explanation of, its reliance on an apparently subjective component for determining the reasonableness of the scope of weapons search. Certainly review was granted primarily to disclaim the holding below that further action by an officer could not be supported by what the officer had learned by "plain feel" during a frisk. But the parties did not focus on this to the exclusion of the

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(No. 91-2019), 1993 WL 286634. In oral argument, counsel for the petitioner emphasized that the State believed the state court erroneously "focus[ed] solely on what was in the mind of the officer." Transcript of Oral Argument at 10, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 761230.

The United States did not address or perhaps even recognize the issue. Its position was primarily that the state appellate courts erred in dividing the officer's conduct into two parts divided by his subjective realization that the object was not a weapon. Brief for United States as Amicus Curiae Supporting Petitioner at 11, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1992 WL 12012063. ("Officer Rose . . . did not make an initial determination that the object was not a weapon and then a separate decision to keep searching."). It did argue incidentally that the state courts erred in "relying on the officer's testimony that he stopped respondent to search for both weapons and drugs" because this was inconsistent with *Horton's* objective approach. *Id.* at 11 n.3. But it did not explicitly challenge the state court's use of a subjective standard in determining the scope of the permissible search.

At oral argument, counsel for the United States argued that the state court erred in stating that an officer is not entitled to go further if "the officer feels an object that cannot possibly be a weapon." Transcript of Oral Argument at 22, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 761230. When asked how he would amend the state court's language, he responded that he would say that an officer cannot go further "if the officer feels an object that he knows is not a weapon." *Id.* at 23. He was then asked if this was not a subjective test "that the law eschews." He answered affirmatively, and then gave no indication that the United States regarded this as inappropriate. *Id.*

Later, counsel urged that the Court "adopt an objective standard that recognizes as presumptively reasonable momentary handlings of unrecognized objects, so that courts in innumerable cases aren't confronted with the difficulty of determining [whether] the police officer [did] determine that [the object] was not a weapon before he finished manipulating the object." *Id.* at 27. He then added, "that presumption could be overcome by evidence that, in fact, the police officer had satisfied him or herself there was no weapon there, but continued searching." *Id.* at 28.

[177] Respondent's Brief on the Merits at 20, 34, *Dickerson*, 508 U.S 366 (No. 91-2019), 1992 WL 511981.

lower court's reliance on a subjective analysis, and that issue simply could not have escaped the Court's attention.

F. Explicit Rejection of Future Intrusiveness: Hodari D.

The case for emphasizing officers' states of mind in determining Fourth Amendment reasonableness is stronger if the Fourth Amendment is properly used to identify and discourage improper law enforcement activity because of what is likely to follow rather than what has already occurred. Much of the Court's approach during the period discussed in the last section appeared to reflect, in part, the Court's developing perception that Fourth Amendment analysis should focus on demonstrated past intrusions on protected interests rather than the risk of future ones.

This attitude was solidified in *California v. Hodari D.*,[178] addressing when law enforcement conduct constitutes a seizure of a person. Technically, *Hodari D.* posed the question of whether a seizure occurs when an officer makes a show of authority and the suspect does not submit but flees. In practical terms, as one member of the Court recognized during oral argument, the real question is whether the Fourth Amendment should apply to attempted seizures.[179] Although it is a question of Fourth Amendment coverage rather than reasonableness, its resolution by the Court reaffirmed the trend towards objective criterion clearly reflected in the reasonableness decisions.

The Court's holding in *Hodari D.*, that the situation at issue did not give rise to a seizure, was based largely on the majority's conclusion that law enforcement shows of authority will be sufficiently discouraged if the Fourth Amendment is applied only to those that are successful.[180] In effect, it solidified the Court's developing perception that generally Fourth Amendment focus is properly on the actual impact of law enforcement activity rather than the risk of future and more intrusive impacts that particular activity poses.[181]

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[178] 499 U.S. 621 (1991).

[179] Transcript of Oral Argument at 7, *Hodari D.*, 499 U.S. 621 (No. 89-1632), 1991 WL 636280.

[180] 499 U.S. at 627.

Had *Hodari D.* gone the other way, the Fourth Amendment concern with the future impact of at least some law enforcement activity would have made a strong case for more emphasis on officers' states of mind.

G. Reaffirmation of the Objective Approach: Whren *and* Robinette

The Court addressed more broadly and expansively the area of subjective awareness and Fourth Amendment standards in *Whren v. United States*,[182] although the case appeared to present a relatively narrow aspect of the long-standing "pretext" issue. Whren had been stopped by officers with grounds for a traffic stop—probable cause to believe that the driver had violated several traffic laws[183]—but unquestionably motivated by their suspicions that the occupants of the vehicle had been engaged in a drug transaction. Attempting to avoid the baggage of an argument tied to subjective motivation, Whren urged that the officers' actions should be evaluated under a Fourth Amendment standard prohibiting as unreasonable a traffic stop that would not have been made by a reasonable officer motivated only by a desire to enforce the traffic laws.

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[181] No contention was made in *Hodari D.* that the criterion for determining whether police action was a seizure should include a subjective component. Respondent argued essentially that attempted detentions should be seizures because, as a general matter, they were made with a state of mind that rendered them intrusive. *Cf.*, Brief for Petitioner at 54-59, *Hodari D.*, 499 U.S. 621 (No. 89-1632), 1990 WL 508078 (challenging Respondent's implied contention that officers who make shows of authority frequently intend to impermissibly search subjects).

Petitioner California did argue that if a seizure was found, the officer's state of mind was relevant to whether discarded contraband was the excludable fruit of that seizure. In the absence of proof that the officer intended to search rather than just detain and question, it suggested, the abandoned contraband was not obtained by exploiting the unreasonable search and hence not fruit of the poisonous tree. *Id.* at 49-53.

[182] 517 U.S. 806 (1996).

[183] Whether probable cause is a Fourth Amendment requirement is not clear, and in fact the definition of a traffic stop has not been addressed in the Court's case law.

The United States' position was that any pretext doctrine is inherently subjective and thus inappropriate under the Fourth Amendment. It briefly defended on its merits a purely objective approach. In part, it suggested that reliance upon officers' states of mind would inappropriately confer different rights on persons in essentially the same situation, and cause prosecutions to come to "incongruous[ly different] results."[184] But it also argued that the nature of Fourth Amendment matters demanded an objective approach: "Because the ultimate Fourth Amendment question is whether the law enforcement interests at stake justify the particular intrusion on privacy interests, the subjective good faith or bad faith of the particular searching officer is not the proper test."[185]

Whren himself made no effort to defend a subjective approach and in fact voiced approval of an objective criterion.[186]

Only the American Civil Liberties Union, participating as amicus curiae, lent any support to a subjective aspect of Fourth Amendment law.[187] It condemned "pretext" law enforcement conduct as inherently inconsistent with constitutional values, and without using the term defined pretext action in subjective terms.[188] It then suggested an analysis that used—but did not rely exclusively on—what a reasonable officer would have done under the circumstances:

> If a defendant succeeds in demonstrating that a reasonable officer would have acted differently under the same circumstances . . . the burden should shift to the police to establish a

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[184] Brief for the United States at 14-15, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 115816.

[185] *Id.* at 14.

[186] Brief for the Petitioners at 31, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758 ("This Court's reluctance to attempt to pin down the subjective motivations of the police who actually made an intrusion makes sense, and the standard urged here does not require any finding of subjective motivation.").

[187] Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners at 6-12, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75760.

[188] *Id.* at 13 ("The issue of pretext only arises when there is a facially plausible reason to conduct the search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards.").

> valid, non-pretextual reason for the search. If the police meet this burden, the evidence should be admissible. If they do not, it should be excluded.[189]

Perhaps quite carefully, it avoided explicitly stating that the prosecution's effort to show "a valid, non-pretextual reason" for the police activity required it to show that the officer was subjectively motivated by that "reason."

Implicitly recognizing that its approach was ultimately subjective in nature, the Union included in its brief a short section arguing that courts can and should consider "clear evidence" that a police officer acted "with subjective bad faith to circumvent the Fourth Amendment."[190] It then offered a defense of this approach:

> The whole point of Fourth Amendment doctrine has been to send messages to officers about their conduct in order to protect constitutional values. It would be inconsistent to ignore the real reason officers act and, instead, ask only whether there might be an acceptable reason that could have justified the officers' behavior. The latter approach encourages pretextual claims; it does not encourage compliance with the requirements of the Fourth Amendment.
>
> In suggesting that an inquiry into motive is appropriate, we do not mean to say that the mere thought that someone might have drugs is enough to invalidate actions taken to enforce traffic laws. The relevant question is whether the operative reason for the stop was invalid. It is the defendants' burden to make that showing and the burden is a heavy one. But, if that showing can be made, it would be an odd notion of law that asked the court to ignore it.[191]

Deciding *Whren*, Justice Scalia writing for a unanimous Court brushed aside Whren's effort to paint his approach as objective. Whren's proposed approach, the Court concluded, was "driven by subjective considerations."[192] It then rejected it on that basis.

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[189] *Id.* at 16-17.
[190] *Id.* at 17-20.
[191] *Id.* at 18.
[192] 517 U.S. at 814.

The Court, Justice Scalia asserted, had "repeatedly held and asserted" that a law enforcement officer's subjective motive does not invalidate "objectively justifiable behavior under the Fourth Amendment."[193] After discussing *Robinson* and the other Fourth Amendment cases and reiterating the holding of *Robinson* as described in *Frank Scott*, he concluded that the case law forecloses "any arguments that the constitutional reasonableness of traffic stops depend on the actual motivations of the individual officers involved." Continuing to broaden his coverage, he added, "[S]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[194]

Turning obliquely to possible rationales for this position, *Whren* acknowledged that *if* the Fourth Amendment's abhorrence of criteria utilizing the subjective intent of the officers was based on the "evidentiary difficulty of establishing subjective intent," Whren's proffer of a standard put in objective terms "might make sense." But the "principal basis" for the Court's cases is not this evidentiary difficulty.

Rather, Justice Scalia continued, the principal basis for the objective standard "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[195] *Why* does Fourth Amendment reasonableness disregard the actors' subjective intent? The Court neither addressed the matter nor evidenced any concern regarding the rationale.

Whren was summarily applied the next term in *Ohio v. Robinette*.[196] Only one of the numerous briefs was filed after *Whren* was decided. Although it is therefore understandable why the applicability of *Whren* was not addressed until oral argument, the manner in which the *Robinette* issues were put and debated illustrated the lack of coherence in analyzing these matters.

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[193] *Id.* at 812.

[194] *Id.* at 813.

[195] *Id.* at 814.

[196] 519 U.S. 33 (1996).

In *Robinette*, the officer clocked Robinette driving at 69 miles per hour in a zone with a posted speed limit of 45 miles per hour. He stopped Robinette, obtained his driver's license, and ran a computer check which was negative. He then asked Robinette to step out of the car. At this point, the officer went to his own vehicle and activated his mounted video camera. He returned to Robinette, issued a verbal warning, and returned his license. He next asked whether Robinette was carrying contraband and when Robinette replied he was not, solicited Robinette's consent to search. The search revealed drugs, which the Ohio Supreme Court held should have been suppressed.

Certiorari was sought on the representation that the Ohio Supreme Court had held that Robinette's continued presence for the discussion was a seizure rather than a consensual encounter simply because the officer had not admonished him, "'[A]t this time you legally are free to go' or by words of similar import." This holding, the Petitioner represented, was articulated in the second of two syllabi issued by the state court with the opinion.[197] Petitioner argued that review should be granted to reaffirm that "when determining whether an encounter is consensual or coerced, the Fourth Amendment requires a review of all the circumstances, not an isolated fact."[198]

Robinette opposed review in part on the ground that the state court had relied primarily upon a determination that the detention "exceeded the permissible bounds of an investigative detention," not on an application of "the consensual encounter doctrine."[199] He noted the state tribunal's opinion had stated that the officer's action, beginning with when he ordered Robinette out of the vehicle, was taken "for no reason related to the speeding violation, and based on no articulable facts."[200] He did not until his brief on the merits refer specifically to the state court's first syllabus, which was explicitly phrased in terms of subjective motivation:

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[197] Petition for Writ of Certiorari at 3, *Robinette*, 519 U.S. 33 (No. 95-891), 1995 WL 17013677.

[198] *Id.* at 7.

[199] Respondent's Brief in Opposition at 3, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 33413299.

[200] *Id.* at 5.

> 1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.[201]

In his merits brief, Robinette referred to this syllabus as stating the state court's "holding," and characterized the second syllabus and its reference to an admonition as imposing only "an advisory requirement upon law enforcement personnel."[202] Thus he relied upon the lower court's subjective analysis to argue that the issue posed by Petitioner was in fact not presented.

In the briefing, the attention of the parties and amici focused on the language referring to an admonition and not on any possibility that the state tribunal had improperly relied on the officer's subjective state of mind. At oral argument, however, counsel for Petitioner was pressed on whether syllabus one was an alternative holding on which the state court decision could rest. Petitioner argued confusingly that the two syllabi were interrelated and neither by itself could support the result.[203] She referred once to *Whren*, but several times stated inexplicably but clearly that she regarded syllabus one as a correct statement of the law.

Counsel for the United States acknowledged that syllabus one was "flawed" because it relied on the officer's subjective intention.[204] He agreed that the officer in fact ordered Robinette out of the car for the subjective purpose of questioning and video taping him regarding contraband rather than speeding. Nevertheless, he argued, what controlled was that a reasonable officer could under *Pennsylvania v. Mimms*[205] have removed him from the car for reasons of safety.[206] This was because "the business of [the] traffic stop was not complete," and Fourth Amendment law permits removal of the driver during a traffic stop that did not exceed what was in some objective sense the duration necessary to complete the traffic offense related "business." Later, he agreed that the officer's subjective motivation is "relevant . . . to . . . what a reasonable officer would do," but maintained it is not "dispositive."[207]

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[201] State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995).

[202] Brief for Respondent at 5, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 312162. .

[203] Transcript of Oral Argument at 15, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 587659.

[204] *Id.* at 22.

Counsel for respondent Robinette asserted explicitly that the state court's decision turned upon its conclusion that the officer had determined "in his own mind" to only give a warning.[208] When pressed, he begrudgingly agreed that the officer's subjective motivation "is not dispositive of the broader issue."[209] Counsel defended syllabus one as complying with Fourth Amendment law.[210] Although this was far from clear, he apparently regarded the state court's reference to the officer's motivation as reflecting only that the state court considered this as one factor in determining that the detention exceeded what under an ultimately objective standard was reasonable in light of its justification.

Before rejecting the Ohio court's requirement of an admonition, the Supreme Court addressed the contention that the state court's result rested independently on the ground articulated in syllabus one.[211] Requoting the Court's use of the *Frank Scott* language in *Whren*, the Court summarily held that the state court erred insofar as it held that the officer's "subjective thoughts" made the continued detention of Robinette "illegal under the Fourth Amendment."[212]

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[205] 434 U.S. 106 (1977).

[206] Transcript of Oral Argument, *supra* note 179, at 23.

[207] *Id.* at 26.

[208] *Id.* at 34.

[209] *Id.* at 35.

[210] *Id.* at 43.

[211] *Robinette,* 519 U.S. at 49 (Stevens, J., dissenting) (arguing that the Ohio court's decision could and should be read as dealing not with motivation but rather justification for the continued detention).

Functionally, then, *Robinette* addressed the significance of the officer's state of mind in situations in which as a general rule the fact that the officer has made a reasonable traffic stop permits the officer to remove the driver from the vehicle. Although the rationale for the rule is officer safety, a particular exercise of the power conferred by the rule is not rendered unreasonable by proof that the officer was subjectively motivated not by safety considerations but by a desire to facilitate investigation of suspicion of drug activity.

H. *The Short-Lived Qualification of* Whren: *Law Enforcement Conduct Permissible on Less Than Probable Cause*

The separation of Fourth Amendment reasonableness and the motivation of officers in *Whren* is apparently subject to one exception.[213] Acknowledging "pretext" language in earlier decisions involving inventory searches[214] and "administrative" searches of licensed premises,[215] the Court reaffirmed that officers' motivation is relevant to the reasonableness of these law enforcement actions. "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation," it stated unequivocally, "is not accorded to searches that are *not* made for that purpose."[216] Summarizing its rejection of attacks based on officers' motivation, Justice Scalia continued: "Subjective intentions play no role in ordinary, *probable-cause* Fourth Amendment analysis."[217]

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[212] *Id.* . at 38.

[213] Whether *Whren* purported to insulate objective reasonable law enforcement actions from challenge on grounds of racial motivation is unclear. *See* Holland v. City of Portland, 102 F.3d 6, 10-11 (1st Cir. 1996) (finding *Whren* "strongly implies" that arrests are still subject to equal protection racial motivation challenges, but "does not say what facts would be needed to support such a challenge").

[214] *Whren*, 517 U.S. at 811 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990); Colorado v. Bertine, 479 U.S. 367, 372 (1987)).

[215] *Id.* at 811 (quoting New York v. Burger, 482 U.S. 691, 716-17 (1987)).

[216] *Id.* at 811-12.

[217] *Id.* at 813 (emphasis added). This may explain the Court's insistence in *Whren* that as a general matter, traffic stops are reasonable "where the police

Conversely, the Court's language obviously suggests, "subjective intentions" are—or at least may be—relevant to Fourth Amendment analysis of law enforcement action requiring less than probable cause. Five years after *Whren*, however, the Court simply ignored the *Whren* opinion's suggestion that its rationale was limited to situations in which Fourth Amendment analysis required probable cause.

This occurred when the Court turned to so-called "probation searches" in *United States v. Knights*.[218] The Ninth Circuit had held below that California properly applied reduced Fourth Amendment standards to certain searches of convicted defendants on probation. That special treatment, it continued, could apply only to searches identified by the subjective intention with which they were made. Since the search in *Knights* was made for "investigatory" rather than "probationary" purposes, it could not be upheld under these relaxed standards.[219]

In its presentation to the Court, the Government argued that the court of appeals' distinction between types of searches was "flawed" because it ignored that "the proper focus in this area of Fourth Amendment analysis is on the objective justification for the officer's conduct, not on its subjective purpose."[220] Knights asserted that the Court had previously categorized probation searches as special needs searches, and—without defending the wisdom of that position—asserted that because the special needs doctrine applied, "an inquiry into purpose is essential."[221] The Government did not directly

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have probable cause to believe that a traffic violation has occurred." *Id.* at 810. Given the nature and brief duration of stops for issuance of citations, a reasonable argument can be made that Fourth Amendment reasonableness permits such stops on reasonable suspicion. If the Court believed that traffic stops should not be subject to challenge on motive grounds but it was unprepared to divorce motivation from police actions permitted on less than probable cause, it was required to treat traffic stops as based on probable cause.

[218] 534 U.S. 112 (2001).

[219] 219 F.3d 1138 (9th Cir. 2000).

[220] Brief for the United States at 25, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL 799254.

[221] Brief for Respondent at 3, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL

challenge Knights' reliance on a special needs doctrine implicating subjective motivation, but simply and without elaboration urged the Court to analyze the search at issue under general Fourth Amendment doctrine and to uphold it as based on effective consent.

The Court—without explanation—declined to analyze the search as one within a special needs category defined by the purpose for which the searches are made. Instead, it applied "ordinary Fourth Amendment analysis"[222] but did not accept the Government's suggestion that under this analysis consent alone rendered the search reasonable. The Court's analysis instead considered the totality of the circumstances,[223] and led the Court to the conclusion that the Fourth Amendment permits the search of a probationer's house on reasonable suspicion.[224] This was present in *Knights*. Since it used ordinary Fourth Amendment analysis, it added, it had no need to examine "official purpose" or—apparently—the actual motivation of the officers who made this specific search.[225]

Justice Souter concurred, observing that he would "reserve the question" of whether the bar to consideration of subjective intention in *Whren* extends to searches based only on reasonable suspicion.[226]

Knights did note that challenges to searches based on the actual motivation of the individual officers were apparently still available in "some special needs and administrative search [situations]."[227] It apparently held, however, that despite *Whren*, subjective motivation is irrelevant to searches permitted on less than probable cause under general Fourth Amendment analysis. The majority provided no explanation for that position, but simply assumed summarily that this was what *Whren*—on good and sufficient reason—meant.

1758051 (quoting Griffin v. Wisconsin, 483 U.S. 868 (1987)).

[222] *Knights*, 534 U.S. at 122.

[223] *Id.* at 118 (quoting *Robinette*, 519 U.S. at 319).

[224] *Id.* at 121.

[225] *Id.* at 121.

[226] *Id.* at 123 (Souter, J., concurring).

[227] *Id.* at 122.

I. Keith Scott*: Exclusion of Tainted Evidence on Matters Other Than Guilt*

In the Court's 1978 discussion in *Frank Scott*, the Court suggested that officers' states of mind would appropriately be incorporated into the criteria to be used in determining whether a constitutional violation warranted an exclusionary sanction. *Leon*, of course, indicated that the Court was hardly committed to any such approach. This hostility towards the suggestion in *Frank Scott* resurfaced in 1998 when, in *Pennsylvania Board of Probation & Parole v. Keith Scott*,[228] the Court again rejected a motive-based criterion for determining whether the Fourth Amendment exclusionary requirement barred use of tainted evidence for purposes other than proving the guilt of an accused criminal defendant.

At issue in *Keith Scott* was the application of the Fourth Amendment exclusionary rule to proceedings for revocation of a convicted defendant's parole. The state court had recognized that this turned upon whether the incremental deterrence of law enforcement conduct that would be accomplished by application of the sanction here would be worth the costs paid, primarily those costs occasioned by the loss of reliable evidence in administering the parole system. As a general rule, the state tribunal reasoned, the incremental deterrence achieved by this expansion of the sanction would be minimal. Along with a number of other courts, however, it reasoned that officers aware of a suspect's status as a parolee would be significantly deterred from unreasonable conduct if the results of such conduct could not be used in parole revocation proceedings. Thus, it held that evidence obtained in violation of the Fourth Amendment was inadmissible in a parole revocation proceeding if, but only if, the evidence shows that the officer who violated the Fourth Amendment knew, or had reason to know, that the suspect was at the time a parolee.[229]

The Supreme Court summarily rejected this position. It questionably concluded that police officers, or even parole officers, who know of suspects' parole status[230] can be discouraged from violating such suspects' Fourth Amendment rights by methods other than exclusion of resulting evidence from parole revocation proceedings. Thus, the deterrence effect would be minimal.[231] First, and apparently primarily, however, it rejected the state court's approach as "a piecemeal approach" that would unacceptably "add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status."[232]

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[228] 524 U.S. 357 (1998).

[229] Scott v. Penn. Bd. of Probation & Parole, 698 A.2d 32, 37-39 (Pa. 1997).

The precise basis for the Court's rejection of the limited exclusionary sanction is not clear. Perhaps the objection was to the difficulty—and thus the financial and convenience costs—of resolving claims of unreasonable action when those claims are raised in what is essentially a nonjudicial process. The Court may have assumed that application of the state court's approach would require additional—and hence "collateral"—judicial proceedings to resolve those claims. Nevertheless, the Court's emphasis on the need for inquiries to delve into "the officer's knowledge of the parolee's status" suggests that its opposition was based, in part at least, on the subjective nature of the inquiry that would be necessitated by the state court's formulation of the rule.

Does *Keith Scott* indicate that the Court will only embrace application of the federal constitutional exclusionary sanctions to limited situations upon demonstration that the officers were subjectively aware of the unusual nature of the situation and thus particularly subject to deterrence by exclusion of the evidence as it was eventually offered? To the extent that *Keith Scott* turned on the subjective nature of the inquiry involved, of course, it suggests that such approaches will not be applied elsewhere. Unfortunately, the summary disposition in *Keith Scott* of the state court's effort to finely tune the balance of deterrence versus costs leaves this uncertain.

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[230] The Supreme Court treated the holding below as requiring subjective knowledge of the suspect's parolee status. In fact, the state court appeared to hold that exclusion would be required if the facts demonstrated that the officer knew or should have known of that status; see *supra* text accompanying note 205.

[231] *Keith Scott*, 524 U.S. at 368-69.

[232] *Id.* at 368.

J. *Reaffirmance of Objective Standards for Arrest in Non-Pretext Situations:* Devenpeck v. Alford

Whren rejected a subjective component to the analysis applied when an arrest is challenged as a pretext. It would seem to follow, of course, that no subjective component should be applied when a challenge to an arrest does not attribute a nefarious pretext motivation to the officers.

Any doubts were laid to rest in *Devenpeck v. Alford*,[233] addressing the "closely related offense" rule. That rule, as articulated by some lower courts, applies if an arresting officer announces at the time of an arrest the basis for it. The prosecution can defend the arrest against Fourth Amendment attack on the basis that it was supported by probable cause to believe the suspect committed any offense based on the conduct identified by the announcement. It may not, however, defend it on the basis of probable cause to believe the person committed an offense by other conduct.[234]

Respondent Devenpeck defended the rule as preventing a party from defending law enforcement action by "go[ing] through every fact, posit conduct that arguably could have provided probable cause, and then treat[ing officers] as if they actually *did* arrest (or search) based on [this] conduct."[235] Permitting this, he commented, "is the height, and nadir, of subjective self-indulgence."[236] The limit imposed by the rule "does *not* depend upon a subjective component." Instead, it "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-serving statements and speculation."[237]

The case against the rule was made most effectively by the

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[233] 543 U.S. 146 (2004).

[234] *See* Gasho v. United States, 39 F.3d 1420, 1428 (9th Cir. 1994).

[235] Brief for Respondents at 9 n.9, *Devenpeck*, 543 U.S. 146 (No. 03-710).

[236] *Id.*

[237] *Id.* at 9 (quoting Trejo v. Perez, 693 F.2d 482, 486 (5th Cir. 1982)).

United States as amicus curiae supporting the petitioners. Most significantly, the Government argued, the rule conflicts with the basic Fourth Amendment principle that the validity of law enforcement action under the Fourth Amendment turns on an objective assessment rather than on the officers' states of mind. Even if conduct was objectively justified, the Government continued, the closely related offense rule condemns it on the basis of "bad faith." Devenpeck's emphasis on the role of an objective fact—the officer's statement of the reason for the action—did not change the rule's focus on subjective motivation. Like the argument made by Whren, this was an effort to root out a subjective vice through objective means, and thus as constitutionally unacceptable as Whren's contention.[238]

A unanimous eight justice Court accepted the Government's characterization. The closely related offense rule is inconsistent with Fourth Amendment case law because it "makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not 'closely related' to that subjective reason."[239]

The submissions in *Devenpeck* make clear the disrepute into which subjective aspects of the Fourth Amendment standards have fallen. The Government's attack on the legal doctrine at issue focused less upon any possible justification it might have than upon whether it could be linked to subjectiveness. The respondent focused desperately on characterizing the position of the lower court as "objective."

The Government even attempted to paint the rule applied by the court of appeals as more subjective, or subjective in a worse way, than other subjective approaches disapproved by the Court. The closely related offense rule, the Government argued, is "impermissibly subjective because it holds that the validity of an arrest turns on the arresting officer's subjective

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[238] Brief for the United States as Amicus Curiae Supporting Petitioners at 12-14, *Devenpeck*, 543 U.S. 146 (No. 03-710).

[239] *Devenpeck*, 543 U.S. at 154.

legal evaluation of the crimes for which probable cause exists."[240]

During oral argument, the attorneys were questioned regarding the need for an arrest to be upheld on only those facts known to the officers. They responded that only those facts of which the officer was aware could be relied upon by the prosecution.[241] The Court in its opinion indicated agreement, noting that "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest."[242] No rationale was offered by the Court.

At oral argument, Justice Stevens had pointed out to counsel for the United States that a rule limiting consideration to those facts known to the officer involves some inquiry into the mental processes of officers in every case. Counsel responded that this rule involves only acceptable inquiry into "what comes into [the officer's] mind, into the brain, his senses." He contrasted this with inappropriate consideration of what is produced as a result of the officer's brain functioning.[243]

The Court's analysis in *Devenpeck* considerably oversimplified the problem by assuming that the only relevant matters are facts (which must have been subjective known to the officer) and "the reasonable conclusion" that there is probable cause to believe the person committed an offense (which is an objective inquiry). In fact, between these two are inferences that might be drawn from the known facts, short of a conclusive one, that probable cause exists.

The issue was addressed at oral argument in *Maryland v. Pringle*.[244] The members of the Court questioned counsel for the petitioner on the required manner of determining whether an officer has probable cause to believe a passenger in a car in which drugs were found was in criminal possession of them. Justice Stevens attempted to put to counsel a hypothetical in which both of two passengers were hitchhikers. Counsel pointed out that whether or not a passenger was in fact a hitchhiker is often disputed. Justice Stevens persevered, asking counsel to assume that the officer somehow knew that representation made to the officer about the passengers' status were true. Counsel responded: "[O]f course, . . . you would measure the probable cause by an objective standard and not by the subjective standard of that particular police officer."[245]

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[240] Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 216, at 14.

[241] Transcript of Oral Argument at 10, 16, *Devenpeck*, 543 U.S. 146 (No. 03-710) (oral argument of counsel for the United States as amicus curiae).

[242] *Devenpeck*, 543 U.S. at 152.

[243] Transcript of Oral Argument, *supra* note 218, at 22-23.

[244] 540 U.S. 366 (2003).

Counsel's contention was apparently that the probable cause analysis must rely on facts known to the officer but is not limited by the inferences actually drawn by the officer. If an officer is proved to have firmly believed that a passenger is a hitchhiker unknown to the driver until minutes before the situation developed, can the prosecution nevertheless argue that a reasonable officer could have, or would have, entertained considerable doubt whether that was in fact the case? In the *Pringle* argument, counsel's comment was not pursued or discussed further. *Devenpeck*, however, ignores the problem that comment identified.

K. Exigent Circumstances Searches and the Nail in the Coffin: Brigham City, Utah v. Stuart

Whether any major Fourth Amendment criteria for determining the reasonableness of law enforcement action has a subjective component seemed to be posed for consideration in *Brigham City, Utah v. Stuart*.[246] In addressing the reasonableness of officers' entry into residential premises, the Utah Supreme Court distinguished between an exigent circumstances search and an emergency aid search. The second, it reasoned, imposed less stringent requirements than the first but was distinguished by the officers' motivation: the officers must be motivated by a desire to provide assistance to a person inside the premises they believe to be injured or otherwise in need of assistance.[247]

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[245] Transcript of Oral Argument at 19, *Pringle*, 540 U.S. 366 (No. 02-809).

[246] 122 P.3d 506 (Utah 2005), *rev'd* 126 S.Ct. 1943 (2006).

The Utah court held that the entry into the premises was not reasonable under either doctrine. The exigent circumstances doctrine did not apply, it appeared to reason, because the information available to the officers did not—apparently as judged under an objective standard—indicate a risk of sufficiently serious harm to any occupant. Why the court regarded the emergency doctrine as inapplicable was less clear. Again, the court was persuaded that the objective component was not met.[248] Some language in the opinion indicates that the court alternatively reasoned that the subjective component was not met, apparently because the evidence failed to show that the officers actually rendered any "medical assistance" but instead "acted exclusively in their law enforcement capacity, arresting the adults for alcohol related offenses."[249]

Brigham City's Petition for Writ of Certiorari characterized the court below as having held that the emergency aid doctrine did not apply because the prosecution failed to establish the proper motivation on the officers' part[250] and put the first question presented for review as whether the emergency aid exception to the Fourth Amendment requirement of a search warrant "turn[s] on an officer's subjective motivation for entering the home?"[251] The Brief in Opposition acknowledged that "[t]he seminal state appellate case related to the emergency aid exception to the Fourth Amendment," *People v. Mitchell*,[252] required that the search "must not be primarily motivated by an intent to arrest a person or seize evidence."[253] It then without explanation asserted that courts applying *Mitchell* have applied its standards "in an objective manner" and "apply an objective standard to the *Mitchell* guidelines." Consequently, "there is no conflict or question left unanswered concerning the objective standards applied by courts throughout the country."[254]

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[247] The Court did not carefully identify the burden of persuasion on the subjective component, and in fact at times appeared to characterize it negatively: "The search [must] not [be] primarily motivated by intent to arrest and seize evidence." *Id.* at 513.

[248] *Id.* at 514 ("[T]he circumstances known to the officers at the time of entry did not create a reasonable belief that emergency aid was required.").

[249] *Id.*

[250] Petition for Writ of Certiorari at 5, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

[251] *Id.* at i.

[252] 347 N.E.2d 607 (N.Y. 1976).

The Supreme Court granted review[255]—it later explained—to resolve the differences among the lower courts concerning the Fourth Amendment standards governing warrantless entry by officers in an emergency situation. The Court's description of the lower court decisions cited as illustrating these differences makes clear that they were all related to whether the Fourth Amendment standards included a subjective criterion.[256] Beyond question, review was granted on the objective-subjective question.

In briefing the merits, Stuart assumed that the court below had considered the officers' subjective motivation and—quite awkwardly—defended that position. Under *Whren*, Stuart argued, law enforcement action extraordinarily intrusive on privacy interests is subject to Fourth Amendment scrutiny that considers, among other factors, the officers' subjective intent. This is properly done, the argument continued, because a subjective component addresses Fourth Amendment concern regarding law enforcement officers' potential lack of objectivity in determining whether intrusive action is justified.[257] Lack of objectivity is a concern not limited to emergency searches, of course. Stuart's argument nevertheless made no effort to explain why in this context but not others this consideration supported a subjective component.

The National Association of Criminal Defense Lawyers filed an amicus brief addressing the matter at more length.[258]

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[253] Brief for Respondents at 4-5, *Brigham City*, 126 S. Ct. 1947 (No. 05-502).

[254] Brief in Opposition to Petition for Writ of Certiorari at 3, *Brigham City*, 126 S. Ct. 979 (No. 05-502).

[255] Brigham City v. Stuart, 126 S. Ct. 979 (2006).

[256] *Brigham City*, 126 U.S. at 1947.

[257] Brief for Respondents, *supra* note 230, at 4-5.

[258] Brief of the National Association of Criminal Defense Lawyers as Amicus

Inquiry into officers' subjective motivation is appropriate, the Association argued, when a search is supported on the basis of a Fourth Amendment rule that requires at most objective reasonable suspicion of an emergency situation. The absence of any requirement of an objective basis for believing criminal "wrongdoing" has occurred, it suggested, leaves the power to search so subject to abuse as to require the extraordinary step of inquiry into the officers' subjective "primary purpose." No effort was made to explain why reasonable suspicion to believe an emergency exists is less effective in limiting law enforcement discretion that reasonable suspicion to believe criminal activity is afoot.

Petitioner Brigham City, supported by the United States as amicus curiae, argued that there was no basis for treating the search at issue in *Brigham City* differently than other law enforcement action evaluated for reasonableness on purely objective standards. Brigham City acknowledged that subjective considerations might be appropriate in evaluating the reasonableness of purely suspicionless searches, such as inventory searches or checkpoint vehicle stops, apparently on the ground that the lack of any requirement of focused information justifies breaching the general prohibition against subjective standards. Emergency aid searches, it argued, require reasonable suspicion although not probable cause. Thus they do not present the same need for a standard with a subjective requirement.[259]

The United States mounted a broader attack against subjective components in Fourth Amendment standards, arguing that the reasons for disfavoring subjective requirements gen-

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Curiae in Support of Respondents at 9-17, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

A discussion critical of the quality of criminal defendants' representation before the Court singled out Brigham City as a case in which the advocacy caused concern among the defense bar. Tony Mauro, *Help Offered for High Court Criminal Cases: But Will Defense Lawyers Swallow Pride and Accept It?*, LEGAL TIMES, May 8, 2006 at 1. It described the amicus brief as "read[ing] like a merits brief." *Id.*

[259] Brief for Petitioner at 16-20, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

erally applied in the *Stuart* situation. Even when law enforcement involves extraordinary intrusions upon specially protected Fourth Amendment interests, it argued, Supreme Court case law establishes that adequate protection against unreasonable intrusions is provided by objective standards demanding a showing of facts known to the officer that support a reasonable belief.[260] It challenged whether the objective requirement for emergency aid searches is in fact less demanding than what the Fourth Amendment requires for other searches.[261] But in any case, it stressed, Fourth Amendment reasonableness is assured by an objective standard requiring known facts making it objectively reasonable for an officer to believe that an immediate need for assistance exists.[262]

In addition, the United States argued, subjective components "necessarily import variability and instability into the law."[263] Officers are denied guidance from case law. Concern regarding judicial review of their motivations will lead to hesitation by officers in the field, which "could lead to serious and sometimes fatal consequences."[264]

Further, it stressed that adding a subjective component to a Fourth Amendment standard does not reduce the infringement upon privacy resulting from the officers' action.[265] Finally, this additional requirement would in fact "[do no] constitutional work." Cases applying a standard with a subjective component and finding emergency entries unreasonable do not rely exclusively on findings of improper motive, but such findings "trail after" determinations that the searches were unreasonable for some other reason.[266]

The matter was nearly ignored in oral argument, which focused on whether the facts met an objective standard. Counsel for Stuart made no effort to defend the lower court's apparent reliance on the officers' motivation. When counsel for Brigham City spoke in rebuttal, Chief Justice Roberts called his attention to the question raising the subjective motivation, and commented, "I . . . haven't heard much about that this morning. How is that presented on these facts?" Counsel responded that the state court's reliance on the officers' motive was contrary to repeated holdings of the Court, and quickly moved to other matters.[267]

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[260] Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

[261] *Id.* at 18-19 n.18 (asserting that the emergency aid rule may require "probable cause" to believe that an emergency need for assistance exists).

[262] *Id.* at 17.

[263] Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 236, at 19.

[264] *Id.* at 20.

[265] *Id.*

[266] *Id.* at 21-22.

The unanimous opinion of the Court, written by Chief Justice Roberts, indicated that the justices saw the argument for a subjective component as undeserving of serious consideration or discussion. Characterizing Stuart's argument as that the entry was unreasonable because "the officers were more interested in making arrests than quelling violence," the Court gave it short shrift.[268] Its cases—including *Whren* and *Scott*—have "repeatedly rejected" the approach on which Stuart's argument was made. "It therefore does not matter . . . whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."[269] The Court went further to announce unequivocally that what is in the mind of the officer conducting a search is never relevant to the Fourth Amendment reasonableness of the search: "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.'"[270] This, the Court strongly hinted, was the case even with regard to inventory searche[271] and despite its earlier language suggesting pretext motivation would invalidate such action.[272]

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[267] Transcript of Oral Argument at 53, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

[268] *Brigham City*, 126 S. Ct. at 1948.

[269] *Id.*

[270] *Id.* (quoting Scott v. United States, 436 U.S. 128, 138 (1978)) (emphasis added).

[271] The reasonableness of some searches or seizures, it noted, permits an inquiry into "programmatic purpose." This is the case with suspicionless checkpoint

Clearly the Court granted review in *Brigham City* with some expectation that whether the Fourth Amendment reasonableness of emergency searches had a subjective component posed a meaningful issue. Upon full consideration, and perhaps in light of the respondent's failure to meaningfully address the issue, the Court decided that the issue was not a serious one. It rejected it by citing its longstanding emphasis on objective criteria and restating Fourth Amendment doctrine in apparently absolute terms—the subjective state of mind of the officer is never relevant to the Fourth Amendment reasonableness of a search or seizure.

L. *Summary*

Any effort to make sense from the Supreme Court's case law requires some organization of the issues. As Professor LaFave recognizes, if the Supreme Court's case law dealing with officers' perceptions and motivations involves a single problem, it certainly covers distinguishable manifestations of that single problem.[273]

He usefully suggests separating out those in which defendants' claims are based on officers' unexecuted intentions to act unlawfully.[274] This, of course, is *Painten*, in which the basic claim was that the officers' knock on the door was a search or a seizure, and an unreasonable one, because of the officers' intention to—if necessary—enter and search without

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stops. *Id.* (citing Indianapolis v. Edmond, 531 U.S. 32, 46 (2000)). It added a "see also" citation to the leading inventory search case, *Florida v. Wells*, 495 U.S. 1 (1990). The inquiry into programmatic purpose "is directed at . . . the purpose behind the *program*" and "has nothing to do with discerning what is in the mind of the individual officer conducting the search." *Id.*

[272] *See supra* text accompanying note 183.

[273] LAFAVE, *supra* note 11, § 1.4 (distinguishing "manifestations" of "the question . . . whether a 'bad' intent or motivation by the searching or seizing police officer should be taken into account so as to bring about the exclusion of evidence").

[274] LAFAVE, *supra* note 11, § 1.4(b).

Fourth Amendment grounds.

Professor LaFave also suggests separating what he calls "pretext" cases,[275] in which officers consciously rely on a facially valid legal theory but the defendant challenges this reliance as motivated by a different consideration that could not itself support the officers' action. Amazingly, the Court has not addressed this either, although *Whren* makes clear that such challenges could not succeed under the Court's loose reading of its prior discussions.

With regard to what remains, Professor LaFave's analysis[276] might usefully be expanded and somewhat redirected. He considers what Fourth Amendment law permits to be used as the basis for an attack on the constitutionality of officers' action.[277] In most cases, however, the prosecution will have the initial burden of establishing the reasonableness of the officers' actions given Fourth Amendment standards. Sound analysis, then, suggests that analysis should focus less on possible grounds for challenging evidence as inadmissible and more on what the prosecution must show upon such a challenge to establish the reasonableness of a search or seizure.

Fourth Amendment reasonableness might require that the acting officers were aware of: (1) the facts; (2) the legal theory on which the prosecution later supports the actions; (3) the criterion employed under that legal theory; and (4) the result of applying that criterion to the facts of the case.

In *Devenpeck*, there seemed to be some question whether Fourth Amendment law required proof that the officers were aware of the facts later relied upon to establish the reasonableness of the search. Yet as early as 1925 the Court's discussions suggested this was the case. *Devenpeck*, of course, reaffirmed this.

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[275] LAFAVE, *supra* note 11, § 1.4(e).

[276] LAFAVE, *supra* note 11, §§ 1.4(c) ("mistaken belief grounds for action lacking"), 1.4(d) ("wrong legal theory relied upon"). Professor Burkoff has suggested distinguishing among: (a) actions taken on the basis of insufficient factual observations; (b) those undertaken under "a mistaken notion of the law"; (c) those made "with a latent bad intent"; and (d) "bad faith" actions. John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70, 85 (1982).

[277] LAFAVE, *supra* note 11, § 1.4 (titling it "The Scott 'Bad Faith' Doctrine").

Despite this consensus that the prosecution can support police action only on the basis of facts known to the officers, the Court has, since *Mapp*, been hostile to suggestions that awareness of more might be required. By the time *Devenpeck* was submitted to the Court, the Government was persuaded that the Court was particularly hostile to any suggestion that reasonableness might be affected by officers' subjective *legal* conclusions.

Jones, of course, appeared to require awareness of # 2 and thus to demand proof of officers' legal analyses—in that context, proof that the officers had known about and relied upon the legal rule permitting entry to locate and arrest a person subject to arrest. But the issue did not really surface again until *Royer*, in which the Court summarily assumed that the prosecution need not prove officers were even aware they had seized the suspect or needed grounds to do so to support their actions as a seizure based on probable cause. *Robinette* held that the reasonableness of an extended traffic stop and the officer's removal of the driver from the vehicle did not require proof that the officer acted on the basis of a legal theory related to the actual grounds for the stop. *Devenpeck* made clear that the reasonableness of an arrest for an offense does not require proof that the officer subjectively believed this offense was the basis for the stop or that the facts met the criterion under this theory—probable cause to believe this offense was committed.

What stands out in this history is the complete lack of attention to the basic issue. The parties never focused upon it and the Court never identified it. In none—absolutely none—of the cases was a careful argument in support of a subjective approach made. *Frank Scott* came the closest. But Scott made only a general argument that a system of legal regulation by deterrence needs to take into account the subjective basis on which those regulated have acted.

The result is that the proposition uncritically accepted by all in *Jones*—that the officer must have acted on the basis of the legal theory relied upon later by the prosecution—has become so disfavored that parties before the Court do all in their power to avoid the taint of any association with subjectivity.

Finally, the Court's decisions in toto reflect an implicit recognition that purely objective standards for reasonableness are awkward to formulate and discuss. Often the Court uses common sense and convenient terminology—reasonable beliefs, for example—that assume both subjective and objective components. When pressed by the situation to use objective terminology, it often simply avoids formulating the standard. *Leon*, for example, never explicitly articulates the purportedly objective standard that the prosecution must meet to render admissible evidence otherwise inadmissible.[278]

More important for purposes of Fourth Amendment litigation, the Court's discussions leave unclear how courts should approach application of so-called objective standards, as for example probable cause. Since 1813 in *Locke*, the Court has often referred to facts or circumstances which "warrant" a belief.[279] But does this mean the courts should ask whether a reasonable officer would in fact have formed that belief or only whether the facts provide sufficient support that a belief, if formed, would not be arbitrary? If the question was whether an actually held belief was objectively reasonable, the judicial inquiry would almost certainly be the second.[280] But the

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[278] The Court did say—in a footnote—that the question is "whether a reasonably well trained officer *would have known* that the search was illegal despite the magistrate's authorization." United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (emphasis added). But this question is posed only to determine whether the exception does *not* apply. As an initial matter, must the prosecution show such an officer *would have* believed the search permissible or only that such an officer *could have* reached such a conclusion? The Court failed to address this.

[279] *E.g.*, Maryland v. Buie, 494 U.S. 325, 326 (1990) (indicating a sweep is permissible on facts "which . . . would warrant a reasonably prudent officer in believing the area . . . harbors an individual posing a danger"); McCray v. Illinois, 386 U.S. 300, 304 (1967) ("facts and circumstances . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense").

[280] But in reviewing a warrant, a court should ask only whether the record contains a substantial basis for the issuing magistrate's conclusion that probable cause exists. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). If this deference is a reward to law enforcement for using the preferred warrant process, review of police action taken without a warrant should be more rigorous. This in turn would probably require more than inquiry into whether on the facts a reasonable

Court's insistence on using awkward purportedly objective terminology obscures the matter.

II. RECONSIDERING A PARTIALLY SUBJECTIVE APPROACH TO REASONABLENESS

As the last section demonstrates, the Supreme Court has addressed the possible role of officers' awareness to Fourth Amendment standards in a number of contexts. These include the criteria for determining whether law enforcement conduct is within Fourth Amendment scrutiny, whether conduct subject to scrutiny is reasonable, and whether unreasonable conduct requires suppression of some evidence arguably derived from unreasonable searches or seizures.

What stands out is the lack of any focused attention on whether, in any of these situations, a subjective component of some or all Fourth Amendment standards is consistent with, or suggested by, principles of Fourth Amendment law. This section attempts an analysis of whether in the second context—standards for determining whether conduct constituting a search or seizure is reasonable—Fourth Amendment standards should include a subjective component.

Any analysis must be preceded by formulation of a general approach to determining reasonableness and formulation of a specific possible a Fourth Amendment standard containing a subjective component. This is addressed first.

A. A Framework for Defining Fourth Amendment Reasonableness

Precisely how the courts should determine whether a particular factor—such as the officers' subjective state of mind—is a component of Fourth Amendment reasonableness is not entirely clear. Perhaps a case can be made that the very nature of the Fourth Amendment prohibition against unreasonable searches and seizures requires this. This possibility is explored in part C that follows.

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officer could have formed the belief.

More likely, however, the matter should turn on whether and to what extent this factor—the officers' subjective mental states—impact those considerations the Supreme Court's case law identifies as relevant to reasonableness. Such an approach is developed in this section in general terms. Specific aspects of the analysis are then addressed in more details in parts D though H below.

The Court has made clear that as a general matter, Fourth Amendment reasonableness turns on assessment of two considerations. First, is the extent to which law enforcement activity intrudes upon interests protected by the Fourth Amendment, such as privacy, personal liberty, and the interest in possession of property protected by the prohibition against unreasonable seizures of physical things. Second, is the degree to which the law enforcement activity is needed for the promotion of legitimate governmental interests.[281]

Also, it is clear the analysis must include the costs of treating something as part of reasonableness. To the extent that treating reasonableness as incorporating something that will result in more law enforcement conduct being held unreasonable in the context of exclusionary rule litigation, the loss of evidence is important. Whether incorporating it will increase the difficulty of resolving challenges to the admissibility of evidence and, thus, the time required for this, is significant.

In addition, it is relevant whether treating something as affecting reasonableness will be functional. It is also relevant whether, to the extent that Fourth Amendment law provides remedies, this will in fact appropriately compensate those who have been wronged and harmed. Most important, since Fourth Amendment law is largely preventive rather than remedial, will it reduce the incidence of this in law enforcement action. If officers' subjective states of mind are made part of reasonableness whether in fact this will result in officers acting less often with the wrong states of mind.

Finally, the substance of Fourth Amendment law is sometimes appropriately influenced by systemic considerations.

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[281] *E.g.*, United States v. Knights, 534 U.S. 112, 118-19 (2001).

These are in turn properly influenced by what, given the nature of and remedies for Fourth Amendment requirements, will best serve the function of encouraging law enforcement conduct complying with those requirements. "Bright line rules," for example, may mean that some unreasonable intrusions upon protected interests escape condemnation by the law. But because law enforcement officers can be encouraged to understand and perhaps comply with them, those rules may in the long run best serve the objective of minimizing unreasonable searches and seizures.[282]

Whether officers' subjective states of mind should be incorporated into Fourth Amendment reasonableness, then, best requires consideration of whether those states of mind affect the intrusiveness of or the legitimate need for law enforcement conduct, the costs and potential effectiveness of incorporating it, and the impact of such incorporation on systemtic considerations, including the general effectiveness of Fourth Amendment law as enforced primarily by the exclusionary sanction in criminal litigation.

B. A Proposed Subjective Component for Fourth Amendment Reasonableness

A major impediment to discussion is formulating an appropriate standard for such discussion. Generalization may be difficult. In fact, the Supreme Court's failure to address the matter carefully may be due in part to the difficulty of putting to the Court the basic principle.

A standard must, of course, make some conceptual sense. Also, however, it must be realistic in terms of what information can be developed in litigation with reasonable accuracy and efficiency.

It seems clear that analysis must be based on those facts known to the officer. Even current law requires that, although this position seems to have been accepted without careful consideration. It is common ground, then, that Fourth Amendment reasonableness has some sort of a subjective component. The real question is how broadly should that component be defined.

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[282] *See* Oliver v. United States, 466 U.S. 170, 181-82 (1984) (discussing open fields).

1. A Possible Formulation

For discussion purposes, a proposal can be framed as follows: In determining whether a search or seizure is reasonable, the prosecution should be limited to those general legal theories that were actually and subjectively within the analysis of the officers at the time of the search or seizure.

An officer's analysis might, of course, include several legal rationales. An officer might conclude that an arrest is permissible because the officer has probable cause to believe the subject committed both crimes A and B. Nothing would be accomplished by limiting an officer to a single rationale. So, in this case, the officer's analysis would entitle the prosecution to defend the arrest as for either crimes A or B.

Suppose, on the other hand, the officer considered that the arrest might be justified on the basis of probable cause to believe the subject committed both crimes A and B, but then concluded that the evidence supported only an arrest for crime B. The prosecution should be limited to defending the arrest as one for crime B. Thus, the officer's analysis must in some sense include actual reliance on the legal theory later asserted by the prosecution, even though it need not be exclusive reliance.

If this approach is too inflexible, some leeway could be provided by applying here the approach taken by the inevitable discovery case law: The prosecution can support a search or seizure on the basis of a legal theory not part of the officer's subjective analysis upon proof that had the officers not proceeded on the legal theory they did, they would have considered the other theory, decided it applied, and acted on it.[283]

In either case, the requirement so formulated would not be on its face an impractical one for law enforcement to meet. Professor LaFave's claim that a subjective component to Fourth Amendment standards would require police officers to act "with all the knowledge and acuity of constitutional lawyers"[284] is simply not a valid one.

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[283] To the extent that the distinction between substantive Fourth Amendment law and Fourth Amendment exclusionary penalty law is important, this would best be treated as part of exclusionary penalty law. The general rule would, of course, be part of substantive Fourth Amendment law defining reasonableness.

2. Applying the Formulation to Arrests

For an arrest, then, analysis should start with the facts known to the officer. Courts should ask whether the officer acted on the basis of a conclusion that those facts met the standard applicable to the situation. The officer must have had a practical notion of the legal standard—here, in the arrest context, probable cause.

So, in *Devenpeck*, if an arrest for taping was not permissible, the question would be whether, had they not had that option, the officers would in fact have arrested for an offense arising from their belief that Alford had and had used wig-wag lights. Most likely not. They may well have concluded they had probable cause, but that an arrest was nevertheless not permissible or appropriate.

In *Royer*, the first question would be whether, if the officers had not decided that Royer was effectively consenting to their requests, they would have recognized that they were detaining him and that their information met the legal standard applicable to brief field stops. If that is answered affirmatively, the second question would be whether they would have recognized that their movement of him to the secluded room was permissible only on a higher standard and that their information by that time met this higher standard.

The *Royer* record suggests that the officers may not have been stimulated to analyze the situations in this manner and thus would not have engaged in that reasoning even if they were aware of facts amounting to probable cause. The prosecution would not be able to meet its burden and the detention would be unreasonable despite the fact that properly prepared officers could have—and perhaps would have—accurately concluded that this was the equivalent of an arrest but it was permissible on the information they had developed.

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[284] *See supra* text accompanying note 12.

3. The Traditional "Pretext" Situation

If the approach outlined above is taken, this would not change the result in traditional pretext situations such as *Whren*.

In these cases, as in *Whren*, the evidence generally shows the officers were aware of the legal justification for their action later relied upon by the prosecution. They knew facts meeting that standard, and they acted in reliance on their conclusion that the facts met the standard. The fact that they did this on this rationale for a further reason that was not within the rationale of the traffic laws is irrelevant to this analysis.

This is appropriate. Whether law enforcement action should be unreasonable because it was a pretext in the traditional sense is really a question quite distinct from whether Fourth Amendment reasonableness should require subjective reliance by officers upon the legal theory later offered in defense of the officers' actions.

C. Appropriately Motivated Police Conduct as a Conceptually Necessary Fourth Amendment Goal

A case can perhaps be made that the nature and context of the Fourth Amendment right to be free from unreasonable searches means that reasonableness under the Amendment necessarily involves proper subjective motivation. The Oregon state constitutional formulation of probable cause as containing both a subjective and an objective component is defended by Oregon Court of Appeals Judge Rex Armstrong[285] in conceptual terms that can readily be made into a Fourth Amendment analysis.

Judge Armstrong finds the conceptual basis for a subjective component in the applicability of the constitutional requirement of reasonableness to all branches of government. Courts have an obligation to determine the reasonableness of law enforcement action before those courts permit the evidentiary use of the fruits of that action. Police officers have a similar obligation to determine the reasonableness of their conduct before they engage in that conduct:

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[285] *See* State v. Helow, 15 P.3d 103, 108-09 (Or. Ct. App. 2000) (Armstrong, J., dissenting).

> Officers cannot conduct a search that they have failed to determine is one that they are authorized to conduct any more than judges can uphold a search that they have failed to determine is one that the officers were authorized to conduct. . . . [P]olice officers are legally obliged to comply with [the constitutional requirement of reasonableness]when they search or seize property. They can fulfill that obligation only if they consider the effect of [the requirement of reasonableness] on their actions *before* they act.[286]

He sees this as following from more general principles of legality:

> [This] analysis gives effect to the oft-stated principle that we are a government of laws and not of people. It does that by seeking to ensure that those who enforce the law are guided by it when they act, thereby giving effect to the indisputable principle that a police officer should not, in fact, use her authority as an officer to conduct a search that she does not believe that she has authority to conduct. In other words, it says to officers that they are to act in the belief that the law authorizes their actions, rather than in the belief that they should act and let someone else, most commonly a judge, decide later whether they acted lawfully.[287]

The Supreme Court's objective emphasis, this analysis suggests, focuses too strongly on judicial review of law enforcement action. Wholly apart from whether officers' actions survive judicial review for reasonableness in some sense, reasonableness as applied directly to the officers inherently demands that the action be motivated by a perception that the action is within the authority of the officers under the limited power given them by the law.

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[286] *Id.* at 109 n.2.
[287] *Id.* at 109.

D. Intrusiveness of Law Enforcement Conduct

If—as seems likely—the matter is not conclusively settled by the conceptual nature of Fourth Amendment reasonableness, analysis must turn to the balancing analysis outlined above. The best way to begin is to ask whether the Fourth Amendment intrusiveness of law enforcement conduct is affected by the officers' motivation or state of mind.

Precisely what determines the Fourth Amendment intrusiveness—and particularly the degree of intrusiveness—of law enforcement conduct is unclear, in part because of ambiguity as to what interests are protected by Fourth Amendment law. The Court's case law defining searches has made clear, and perhaps overly emphasized, that the amendment protects an interest in informational privacy. Decisions defining seizures of property make clear that it also protects an interest in security of possession. Other cases considering claims of seizures of the person establish that it protects an interest in freedom of movement.

Yet the Court's cases make clear that the amendment, sometimes at least, protects other and considerably more subtle interests. At least applied to persons who have no desire to change positions, the provision's protection against unreasonable seizures of the person recognizes and protects an interest in being free from undesired encounters with law enforcement officers.[288] Careful reading of the Court's analyses suggests that other and even more subtle interests are at least implicitly recognized as constitutionally relevant.

Several commentators have attempted to identify and define such nonprivacy interests protected by Fourth Amendment law at least as applied to some types of law enforcement activity. William Stuntz, for example, has argued that the provision protects "dignity interests."[289] He does not define these interests with great precision, but clearly he envisions these interests as turning in part upon suspects' unpleasant responses to police activity. A police officer invades these dignity interests, he argues, by publicly accosting someone and treating that person as a suspect;[290] this action invades the protected dignitary interest in part because of what the suspect perceives as its unjustified stigmatizing effect.[291]

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[288] Florida v. Bostick, 501 U.S. 433, 436 (1991) (asserting that bus passenger is seized by officer's approach and efforts to question if a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter).

Sherry Colb has developed a similar and more detailed approach, arguing that the Fourth Amendment protects against "targeting"[292]—"being singled out from others through an exercise of official discretion that is not based on an adequate evidentiary foundation."[293] She argued that this is harmful in a Fourth Amendment relevant manner because of its impact on the suspect, who experiences a unpleasant emotional reaction to the law enforcement action.[294]

Neither Stuntz nor Colb makes a particularly persuasive case that Fourth Amendment case law, at least with any consistency, in actual fact recognizes the interests they see as protected by the provision. Nevertheless, no one can read extensively in that case law without concluding that the provision protects some interests beyond those in information privacy, possession of property, freedom of movement, and freedom from unwanted encounters with law enforcement officers. Specifically, the manner in which searches and seizures are made clearly implicates interests protected by the Fourth Amendment even when that manner does not result in officers obtaining further private information, imposing additional limits upon the suspects' ability to control their property or to move their persons, or increase the number or even the duration of unwanted encounters with officers.

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[289] William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1021 (1995).

[290] *Id.*

[291] *Id.* at 1065 (asserting that in a street encounter, what the officer learns in an informational privacy sense is less important than other considerations, probably "some combination of the stigmatizing nature of the encounter and the police officer's use of force").

[292] Colb, *supra* note 164, at 1491 (explaining that targeting involves a Fourth Amendment harm distinct from privacy invasion).

[293] *Id.* at 1487.

[294] She explains the impact of targeting:

> The additional harm to Z [whose home has been searched without probable cause] is that he is left wondering, "Why me? Why have the police singled me out when they lacked an evidentiary basis? Why didn't they search someone else instead or as well? What gave them the gut feeling that I am a criminal?"

Id. at 1486.

It is fair to conclude that the degree of Fourth Amendment intrusiveness of law enforcement conduct is at least sometimes affected by the adverse emotional impact of that conduct on those subjected to it.[295] Officers' states of mind might affect, in two quite different ways, the extent to which those subjected to law enforcement conduct constituting a search or seizure have an adverse emotional reaction to that conduct.

1. Subject's Contemporaneous Perception

Clearly intrusiveness is affected by the manner in which the subjects of law enforcement conduct perceive it at the time, and the resulting emotional impact on those subjects. It is conceivable that officers' motivation would affect the manner in which the officers' actions are contemporaneously perceived in a way that would increase their Fourth Amendment intrusiveness.

This is possible, of course, only if subjects know officers' states of mind. Undoubtedly officers sometimes communicate their motivation, or at least part of it, perhaps pursuant to local nonconstitutional requirements. Certainly the Fourth Amendment could not give significance to officers' states of mind only when for fortuitous reasons they were communicated to the subject. As *Devenpeck* noted in the context of arrests, such a requirement could be expected to simply persuade officers to withhold any statement of the reasons for their actions.

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[295] *E.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 445, 452-53 (1990) (explaining that reasonableness of checkpoint stops is affected by the subjective intrusiveness of such stops, which means the "fear and surprise engendered in law-abiding motorists by the nature of the particular stop").

The Fourth Amendment might be read as requiring, insofar as possible, that officers provide those subjected to searches or seizures with the legal rationale for the officers' actions. At oral argument in *Devenpeck*, Justice Souter commented that he believed the Fourth Amendment required officers making an arrest to inform the person arrested of the basis for the action.[296] The Court noted only that it had never held this to be constitutionally required.[297] It was not asked in *Devenpeck* to make any such holding and it showed no enthusiasm for reaching the issue on its own initiative.

The Court could, of course, conclude that suspects often enough learn of the bases relied upon by officers who search or detain and thus the impact of such knowledge can properly be considered in formulating the constitutional standard.

To the extent that subjects know of the rationale relied upon by officers in searching or detaining, does it affect those subjects in a manner and to the degree required for the impact to be of Fourth Amendment significance? It is possible. A resident might recognize that an officer searching on the basis of third party consent is relying upon consent from someone known by the resident to have no authority to give such consent. Generally, however, this is probably not so. Whatever determines the impact of the search, it is unlikely to be the perceived legal rationale for the search.

At this point, it is important to distinguish the traditional pretext problem. A subject given a facially valid legal justification by the officer who recognizes that in deciding to act on that rationale the officer gave significant weight to the subject's skin color may be affected in a constitutionally significant manner. As noted earlier, however, this situation is not addressed by that aspect of reasonableness under discussion.

A requirement that officers in fact have relied on the legal justification later offered by the prosecution can probably not be justified as reducing the intrusiveness of the searches and detentions. Barring the prosecution from later relying on a different justification cannot be justified by the value of such a bar in encouraging police to become aware of and communicate to subjects the legal justification for the police action as a means of minimizing the intrusiveness of that action.

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[296] Transcript of Oral Argument at 20-21, Devenpeck v. Alford, 543 U.S. 146 (2004) (No. 03-710).

[297] *Devenpeck*, 543 U.S. at 155.

2. Subject's Subsequent Perception

Fourth Amendment intrusiveness to some extent seems to depend on how the subjects of law enforcement action perceive their situations after the law enforcement action has ended. The impact of a police search of a residence, for example, may continue after the officers leave. The residents' sense of violation may actually increase as the residents have time to mull the situation over. Increased anxiety regarding future possible searches might similarly increase. The effect of having one's residence searched at night might increase the next evening as dusk approaches.

In some situations, this post-search impact will be the only one. Police search of a subject's residence, for example, is highly intrusive even if the subject does not learn of it until after it is completed and the officers gone. This is because of the emotional impact of knowledge that one's privacy has been penetrated. In part, it is because a prior penetration makes a person less confident of the security of privacy in the future.

Police action might be rendered more intrusive in this way by the situation under consideration here. Those subjected to law enforcement actions might be offended in a constitutionally-relevant manner and degree by knowledge that the prosecution can defend the police action on a ground not in fact relied upon by the officers in taking that action.

Consider the resident whose home is searched pursuant to what the resident recognizes at the time as legally ineffective consent. In later litigation, suppose the prosecution is permitted to defend the search as one based on exigent circumstances. The resident may feel again wronged by the law's acceptance of a rationale for the police action that was neither given or extant at the time of the search. If so, does this significantly increase the constitutional intrusiveness of the police action?

To the extent that subjects feel wronged by this state of affairs, do they feel wronged for a reason of Fourth Amendment significance? Most likely, the offense taken is based on a perception that the government has a duty to be forthright and consistent with those of its citizens it acts against. It should be confident before a search that the search is justified and why it is justified, and it should later consistently defend what it did. The government's switch to a new justification casts doubt on whether its decision to search in the first place was "fair" in some sense, and on whether it is treating its citizens with fair consistency.

This may be artificial. Those who seek legal relief from the consequences of police action may give little weight to these considerations. Any offense at the government's inconsistency may pale into constitutional insignificance when compared to the subjects' dismay that the government has been able to acquire evidence of their guilt, and their fear of the consequences of provable guilt of an offense.

Further, any offense may not be entitled to Fourth Amendment significance. Particularly if the intrusiveness of police action is only minimally affected by the officers' states of mind, citizens may have no legitimate claim to protection against the government switching grounds for its action. There may simply be nothing really unfair about the government defending police action on a legal basis differing from that on which it was actually taken.

E. "Need" for Law Enforcement Conduct

Perhaps subjective motivation affects the extent to which law enforcement behavior legitimately promotes the governmental interest in effective and efficient law enforcement. This might be the case on a case-by-case basis or on a more general level.

If action—such as Alford's arrest—turns out to be supportable on grounds different than those the officer taking the action had in mind, the *legitimate* law enforcement need for that activity is arguably quite fortuitous. In some sense, the government has a need to avoid any adverse effects from action already, whether those are the loss of evidence obtained by the actions or the cost of civil liability for the actions. But that interest may not be a legitimate one if it is not planned or intended.

The need for law enforcement conduct most likely turns on the planned nature of it. It seems incongruous to regard law enforcement as having a need to benefit from the unplanned, and thus fortuitous, actions of officers.

To put the proposition another way—the government has a *legitimate* interest only in having law enforcement action *designedly* lead to apprehension, prosecution, conviction, and punishment of guilty persons.

Of course, inevitable discovery suggests otherwise. We give the government the advantage of even the purely fortuitous facts if others would have obtained the information or items properly. We do not deny the government this advantage even if the officers relied upon the rule in intentionally ignoring Constitutional limits.

Why should legitimacy require planning and conscious anticipation? Maybe because in the long run, that best serves the objectives of having only justified action taken.

F. Systemic Considerations

Reasonableness of law enforcement conduct is sometimes influenced by considerations of primarily systemic significance. These are considerations related to the effectiveness of legal rules in effectively discouraging the targeted behavior, rather than case-by-case considerations of such factors as intrusiveness and the need for the specific law enforcement conduct.

The reasonableness of the search of an arrested person, for example, is dramatically influenced by the Court's perception that law enforcement conduct in this context is unlikely to be effectively controlled by a rule that requires case-specific demonstrations of the likelihood that an arrestee will have weapons or destructible or concealable evidence on the person. Any such rule, if actually followed, would discourage searches that are in fact needed. Implicitly, the Court seems to concede, law enforcement officers would recognize the unrealistic nature of the Fourth Amendment requirement and in actual practice apply some other "extra-legal" criterion. A Fourth Amendment rule imposing limits on the scope of searches incident to arrest but permitting them whenever an arrest is made, in other words, most effectively serves to reasonably limit privacy intrusions of this sort that follow arrests.

The strongest case for broadly defined subjective components of Fourth Amendment reasonableness requirements is a similarly systemic one. It is fairly simple: The Fourth Amendment is the basis for what is essentially a regulatory scheme. It should identify and provide a disincentive for unacceptable law enforcement conduct but not penalize such conduct where doing so would not serve to prevent future misconduct. Doing this effectively requires consideration of the actors' states of mind. We generally evaluate and sort conduct in part by the state of mind with which that conduct is performed. A legal regulatory scheme that purports to identify and prevent certain conduct without regard to the states of mind with which the actors engage in that conduct is simply bound to fail. It cannot accurately identify the target behavior or provide an adequately honed penalty for targeted behavior.[298]

A legal scheme that ignores a vitally important aspect of the behavior it purports to regulate cannot command the respect of those it tries to influence. It is difficult to see how conscientious law enforcement officers can have anything short of contempt for a system that litigates the acceptability of police stops of automobiles without regard to the actual legal reasons for which those stops are made.

Fourth Amendment law should identify when law enforcement officers have acted as constitutional standards demand and when they have not. If we want officers to actually analyze situations pursuant to the framework established by Fourth Amendment law, Fourth Amendment law should reward them when they have done that and be willing to penalize them when they have not.

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[298] Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 626 (2004) ("arguing . . . for the relevance, even centrality, of intentions in any regime directed at regulating the police").

It seems common ground that we want officers to know the general law that governs their behavior. We want them to become aware of the relevant facts and then to apply the law to those facts and decide what if any intrusive action the facts and the law permit. We should provide an incentive for them to do this, and a disincentive for acting intrusively without doing it. This is most directly pursued by requiring the prosecution to later, in litigation, support intrusive police actions on those legal theories the officers applied to the facts of which they were aware, and concluded provided a legal justification for their conduct.

1. Available Models

How Fourth Amendment reasonableness would best be formulated from a systemic perspective might be informed by two quite different models used for judicial review in other contexts.

a. Administrative Review Analogy

Administrative law, and specifically judicial review of administrative decisions, might serve as a basis for the Fourth Amendment standard under which courts, in a sense, review the conduct of law enforcement officers.

Many courts—including the United States Supreme Court—review the actions of administrative agencies only on the bases on which those actions were actually taken. The "well-established rule" is that "an agency's action may not be upheld on grounds other than those relied on by the agency."[299] A reviewing court is not to "accept appellate counsel's post hoc rationalization for agency action."[300] Generally, those grounds are to be ascertained from the record made by the agency. Although inquiry into the mental processes of administrative decision makers "is usually to be avoided," the Court has held that a federal district court reviewing administrative action may, if necessary, require those decision makers to testify as to the bases for their action.[301]

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[299] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 420 (1992).

This administrative law approach was initially justified primarily on grounds that courts lacked technical authority to make (and then affirm) discretionary decisions that administrative schemes entrusted to agencies.[302] Nevertheless, it is clearly now based in large part and perhaps primarily upon a perception that effective judicial review of administrative agencies' discretionary decision-making requires that review be of the decisions actually made and the actual reasoning used to make those decisions, not "*post hoc* rationalizations" offered to bring decisions within, what in retrospect appear to be, the most advantageous legal doctrines.[303] This approach permits review of agencies' reasons for action—although generally under the fairly lax arbitrary and capricious standard. One leading treatise characterizes this "judicial review of the agency reasoning process [as] the most important aspect of judicial review of agency action at present."[304]

Modern law enforcement may be regarded as closely akin to administrative agencies, and judicial enforcement of legal requirements by exclusionary sanctions can be regarded as a form of judicial review of officers' administrative-like decisions. If this aspect of criminal procedure law seeks to achieve effective judicial oversight and review of those decisions, the administrative law model suggests that review on the basis of the actual rationales for police actions would be most effective in accomplishing that.

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[300] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

[301] Citizens to Preserve Orerton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

[302] SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (finding administrative action is valid only if it rests on the agency's exercise of judgment, and for courts to make those decisions would invade "the domain which Congress has exclusively entrusted to the agency").

[303] Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199 (1969) (asserting *Chenery* rule is sound if the requirement of a "reasoned decision" is an important tool for curbing arbitrary action).

[304] RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKAIL, ADMINISTRATIVE LAW AND PROCESS 353 (4th ed. 2004). The authors, however, later express their own preference for only limited review, that is, review for grossly inadequate reasoning. *Id.* at 403.

Exclusionary sanction review of police action is, of course, different from judicial review of administrative agency action in ways that might render the administrative model unsuitable in the Fourth Amendment context. Fourth Amendment law is designed less as a basis for complete judicial oversight of law enforcement decisions than one for broad outer limits on police behavior. Yet judicial review of administrative decision making is similarly designed to leave considerable and largely unreviewed decision making authority in the hands of those subject to review.

Ascertaining the actual rationales for police decisions is arguably more difficult than determining the grounds on which administrative decisions are actually made. Law enforcement decisions, unlike those of administrative agencies, do not occur in a situation encouraging, or sometimes even permitting, contemporaneous articulation of the basis for decisions. Judicial review of administrative agency action often occurs during the administrative process. Thus remands to agencies for articulations of the bases for actions still in the process of being taken or implemented is possible.[305] Exclusionary sanction review occurs entirely after the fact. Thus there is no opportunity to permit police to provide during-the-process articulations of the bases for actions taken.

Given the opportunity in administrative procedure for remands for reconsideration, judicial review may function less as review than as a means of encouraging agencies to reconsider the merits of their decisions in light of redefined permissible objectives.[306] Again, the strict after-the-fact nature of exclusionary sanction review means that it cannot work in a similar fashion. To the extent that the administrative law approach is desirable or acceptable because the administrative process permits during-the-fact inquiries into subjective rationales and after-the-fact reconsideration, it may not be appropriate for the much different review conducted by means of exclusionary sanction law.

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[305] *See id.* at 403 (asserting that courts often leave agency action in place but remand cases for agency to address deficiencies in reasoning).

[306] Friendly, *supra* note 303, at 207-08 (stating that *Chenery* rule serves to

b. Appellate Judicial Review Model

Fourth Amendment law might draw not from the administrative model but instead from the approach often used in judicial appellate review of lower court actions.

In this context, trial courts are often affirmed on any possible bases that support the actions taken, even if the appellate records make clear that the trial courts did not act on those bases.[307] If trial courts can be affirmed on grounds they did not rely on, and of which they were blissfully unaware, why cannot police officers' actions be held reasonable or otherwise acceptable if, on review, grounds on which those officers could have acted acceptably can be developed? Why, in other words, should not police officers be viewed as lower courts rather than administrative agencies for purposes of review?

The rule was supported by an early Wisconsin case in these terms:

> [Affirming a trial court order on the ground that it is right regardless of the reasons given] tends to put a finish upon litigation when any other [course] would often needlessly reopen matters to further contests, leading to further large private and public expenditure and waste, without any reasonable probability of reaching a more just termination of the matter.[308]

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permit courts to require agencies to rethink their decisions).

[307] *E.g.*, Arizona v. Fulminante, 499 U.S. 279, 295-302, 306-12 (1990) (upholding state judgment reversing conviction because harmless error did not apply because, although harmless error rule did apply, the record failed to establish that the error was harmless).

[308] Harris v. Welch, 134 N.W. 1041, 1044 (Wis. 1912).

Treating law enforcement decisions like trial court decisions may similarly sacrifice no chance for "more just" results. It avoids a cost even higher than that of further expensive contests, since in the suppression context the matter cannot be reopened but the prosecution is simply deprived of evidence with no chance to salvage that evidence by having the matter analyzed correctly the second time.

The appellate review "rule," however, may be nothing more than an awkward fiction, unsupportable on principle.[309] It may be invoked primarily to enable appellate courts to affirm where they are persuaded that error occurred but did not determine the outcome below and where the appellate tribunals are unable or unwilling to defend affirmances on harmless error grounds. If the appellate review approach is a dishonest fiction, of course, the case for expanded use of it is considerably weakened.

In any case, the rule is not unqualified.[310] One of its limits arguably demonstrates that its underlying principle is inapplicable to exclusionary sanction policy. A number of courts have recognized that an appellate court should not affirm a trial court on a basis not in fact relied upon by the trial court if that basis involves the exercise of discretion and the record fails to make clear that the trial court, if compelled to exercise that discretion, would reach the same result it actually reached on other grounds.[311] An appellant is entitled, in other words, to actually have the benefit of the trial court's exercise of discretion, not just to a record that would support an exercise of discretion. Thus, action below is properly upheld on a basis not relied upon below only if that basis is one that clearly would have been relied upon by the decision maker below, had the basis been considered by that decision maker. If the appellate review rule is proper only if so qualified, it arguably cannot be regarded as appropriate for law enforcement situations.

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[309] An early Missouri discussion of the rule nevertheless stressed the wisdom of trial judges explaining the rationales for the decisions and of the provision of those explanations to the appellate courts. Hanel v. Freund, 17 Mo.App. 618, 621-22 (Mo. Ct. App. 1885) (stating that trial judges' explanations are "in many cases of essential aid to us").

[310] The Supreme Court has refused to apply the general rule where the trial court's failure to address the ground relied upon by the appellee on appeal unfairly deprived the appellant of an adequate opportunity to "respond." Giordenello v. United States, 357 U.S. 480, 488 (1958) (refusing to hold arrest, held valid as one pursuant to warrant by trial court, as valid warrantless arrest, where this would deprive appellant of fair opportunity to cross-examine officer or introduce evidence on warrantless arrest theory); *see also*, People v. Gorak, 242 Cal. Reptr. 307, 311 (Cal. Ct. App. 1987) review denied (affirming on theory not relied upon below only upon a determination that appellant could not have introduced any evidence that would have "defeated" the theory); State v. Montoya, 937 P.2d 145, 149-50 (Utah Ct. App.1997) (finding due process permits appellate court to affirm on ground not relied upon below only if record contains sufficient and uncontroverted evidence supporting that ground to place one on notice that the prevailing party might rely on the ground on appeal). Seldom or never will persons affected by law enforcement conduct be able to make any reasonable contention that judicial review on grounds not relied upon by the officers deprived them of opportunities there at the scene.

Seldom will the courts be able to reliably conclude that officers, properly motivated, would have decided to act as they did on other grounds.

Most perceptions of judicial review of law enforcement conduct recognize that law enforcement officers' decisions are largely discretionary ones. Those who encounter law enforcement officers are thus entitled to have officers properly exercise that discretion. Judicial review via the exclusionary sanction should recognize this and encourage the exercise of discretion of the proper basis. Such encouragement is best provided by an approach that upholds officers conduct when discretion has been exercised on the appropriate basis and an acceptable result reached, not when officers make decisions that would be upheld if reached by appropriate consideration. Judicial review of law enforcement conduct most closely resembles appellate judicial review of discretionary trial court decisions, which, the more insightful case law recognizes, are not subject to affirmation on the basis of a record that would support a decision made after the proper exercise of discretion.

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[311] *E.g.*, United States v. Ross, 9 F.3d 1182, 1189 n.7 (7th Cir. 1993), *vacated on other grounds*, 511 U.S. 1124 (1994), *rev'd on other grounds*, 40 F.3d 144 (7th Cir. 1994) (refusing to uphold revocation, discretionary with district court, on grounds other than those given by district court where record failed to make clear that district judge believed those grounds alone warranted revocation); Snyder v. Am. Legion Spenard Post No. 28, 119 P.3d 996, 1001 (Alaska 2005) (finding rule does not ordinarily apply to discretionary rulings, except where it is clear on the record that the trial court would have exercised its discretion in a manner upholding the judgment actually reached on other grounds); Wagner v. Strickland, 908 So. 2d 549, 551 (Fla. Dist. Ct. App.2005) (refusing to affirm dismissal on ground not relied upon below because record contained nothing indicating trial court was inclined to exercise its discretion under that ground in favor of dismissal); People v. Peach, 280 Cal. Reptr. 584, 589 (Cal. Ct. App. 1991); State v. Hobbs, 801 P.2d 1028 (Wash. Ct. App. 1990). *Cf.*, State v. Hines, 496 N.W.2d 720, 724 (Wis. Ct. App. 1993) (asserting that if trial court failed to properly exercise its discretion, it will nevertheless be affirmed if the record establishes that it would have been affirmed if it had properly exercised that discretion).

A criminal defendant's constitutional right to have the issue of liability determined by a jury means that a conviction cannot be upheld on appeal under a theory proper in the abstract but not submitted to the trial jury. McCormick v. United States, 500 U.S. 257. 270 n.8 (1991) (distinguishing *Arizona v. Fulminante*, 499 U.S. 297 (1990), discussed in note 280).

2. Professor LaFave's Extreme Position

Professor LaFave opposes subjective components to Fourth Amendment standards. He discusses it at greatest length in what he calls "[w]rong legal theory relied upon" situations.[312] His opposition is based in large part[313] on his conclusion that regarding police action as unreasonable because officers failed to adequately reason out the propriety of their actions makes little or no difference. In support, he argues that had the officers done what the law seeks to have them do—consciously analyze the situation correctly—they would have done precisely the same thing they did, except on the basis of the correct legal theory. He concludes:

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[312] In these situations "the officer's 'underlying intent or motivation' simply reflects that he picked the wrong legal theory—claiming the arrest was for offense *A*, as to which probable cause was lacking, instead of offense *B*, as to which grounds for arrest were present." LAFAVE, *supra* note 12, § 1.4(d).

This is an unfortunate way to describe the situations, because it assumes that officers have a "legal theory" and the only problem is that it may be the wrong one. This leaves out the possibility that officers may have had no legal theory whatsoever.

[313] He also regards Fourth Amendment standards with subjective components as demanding that officer "act . . . with all the knowledge and acuity of constitutional lawyers." *See supra* text accompanying note 12. While some subjective requirements might demand something of this sort, this is not a valid objection to all possible such standards; *see supra* text accompanying note 12.

> Suppression for police reliance on the wrong theory even when there exists an alternative valid theory would prevent unconstitutional searches only if, absent such an extension of the exclusionary rule, it may be assumed police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware. That assumption, in my judgment, is fanciful.[314]

He sees no need for the Fourth Amendment to attempt to modify law enforcement conduct where in retrospect there is a theory on which that conduct would be upheld.

On a functional level, LaFave's position rests on an assumption that if an officer has formed a theory that permits the officer to act, Fourth Amendment law cannot realistically hope to encourage the officer to make more certain that the theory is the appropriate one and that it in fact permits the officer to act.

This is really an expanded good faith rule, which LaFave takes to its logical objective extreme: Officers who act in good faith on a legal theory have done all that can be expected or demanded. They so often act in actual good faith on a legal theory that the law will not inquire whether this was so in particular cases. The Fourth Amendment's function is therefore adequately served if the officers' action is supported by a showing that a reasonable officer could or would have formulated and acted on a motivation that the courts would later accept.

Professor LaFave is probably correct in part. To the extent that the nuances of Fourth Amendment law trickle down to officers making the decisions, there may be little or no risk that those officers will respond by consciously acting in a way that seems illegal to them in reliance on lawyers' ability to develop a legal theory supporting the action.

What is more likely is that officers will simply place even less emphasis on their need to legally analyze situations. If Fourth Amendment law actually conveys a message to those in the field, it may be one of encouragement to act on impulse or intuition and let the lawyers sort out the legalities later.

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[314] LAFAVE, *supra* note 11, § 1.4(d), at 124.

More generally, the lack of a subjective component to Fourth Amendment standards may to some extent contribute to a general attitude on the part of law enforcement that Fourth Amendment law is so uncertain, unrealistic, and perhaps even illegitimate that it can with reasonable confidence simply be disregarded. This cannot help but further increase the already considerable difficulty of persuading law enforcement that Fourth Amendment rules should be respected because doing this is the right thing to do.

LaFave's basic mistake, however, is that he assumes there is no important Fourth Amendment reason to worry about police conduct that under some current theory of Fourth Amendment law would be held reasonable by the courts.

In fact, Fourth Amendment substantive and procedural law has considerable slippage. It does not purport to identify and penalize all instances of law enforcement conduct in fact improper. Almost certainly, we rely in large part on the good faith of officers making decisions in the large majority of cases in which there will be no formal legal scrutiny of their actions. Where Fourth Amendment scrutiny does occur, almost certainly it only identifies and penalizes the most egregious cases.

Professor LaFave's analysis ignores the potential value of Fourth Amendment law in stimulating proper analysis of situations by law enforcement officers themselves.

This will certainly make a difference in some cases. *Devenpeck* makes this clear. Whether or not the courts would have upheld the arrest as one for an offense related to the use of wig-wag headlights, the record strongly suggests that the officers—quite reasonably—would not in fact have made it on that basis.[315]

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[315] Transcript of Oral Argument at 11-12, 26-27, Devenpeck v. Alford, 543 U.S. 146 (2004) (No. 03-710).

3. Professor Burkoff's Moderate Position

Professor John Burkoff[316] addressed the issue using as an example what the prosecution might be required to prove to justify as reasonable a search of premises as based on probable cause to believe burning marijuana was in those premises, in turn based on the smell coming from the premises. He would require that the officer actually smell the odor and subjectively recognize it was burning marijuana. But he would not require proof that the officer subjectively believed that his identification of the odor as marijuana met the applicable legal standard for determining the reasonableness of the search.[317]

Why? Because "there is no improper police conduct warranting deterrence."[318] If in fact identification of the smell as marijuana is under the law sufficient for a search, there is no legitimate Fourth Amendment interest served by penalizing officers who act on this basis even if they subjectively believe they are acting in violation of the applicable legal standard.

But this just misses the mark. The real question is *whether* important Fourth Amendment interests are served by penalizing such conduct because it was not motivated by an actual perception that the facts legally justified it. Systemic considerations suggest important Fourth Amendment interests might be served.

4. Appropriately Motivated Police Conduct as a "Practical" Fourth Amendment Goal

The case that reasonableness inherently makes properly motivated law enforcement conduct a necessary goal may not be persuasive. If this is a desirable but not conceptually necessary goal of Fourth Amendment law, it is important to consider how feasible and desirable such a goal might be.

Under current practice, some law enforcement conduct is certainly and by design not the result of officers' case-specific applications of a general standard. Rather, it is a developed but largely intuitive response to a particular situation.

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[316] John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982).

[317] *Id.* at 84-85.

[318] *Id.* at 93.

In other situations, law enforcement conduct appears to be the result of developed reasoning—leading quickly to one result for one reason. Should the law seek to encourage officers to do more? For example, in *Devenpeck*, should the law seek to encourage officers like Devenpeck once they have decided to arrest on one basis to continue "thinking" or "worrying" about other possible grounds on which the arrest might be based?

Perhaps the realities of some aspects of law enforcement mean that some activities by officers simply cannot be the result of conscious analysis and consideration. The time frame in which they must be taken simply precludes this. To the extent that this is the case, of course, any effort by Fourth Amendment law to force conscious analysis and consideration is bound to fail.

Perhaps where conscious analysis is a mechanically attainable goal, it is not a desirable one because of the costs that would be incurred by success. The delay and indecision that would result might well make officers' actions less effective in apprehending offenders, preventing crimes in progress from being completed, or assuring the safety of the officers as they perform their tasks.

The two considerations are certainly related. To the extent that officers perceive conscious analysis and consideration as endangering their safety, for example, they are quite likely to resist it to the degree that it becomes a functionally-impossible goal.

Lawyers generally think that legal education and experience conditions them to "think like lawyers," and that this is a good thing. It may be for lawyers but not everyone. The case for a subjective component of Fourth Amendment reasonableness may reflect a misperception—generated largely by lawyers—that everyone should be pressed to think as much as possible like a lawyer.

The case for this was made in *Robinson*, although by the time the issue reached the Supreme Court the issue had apparently dropped out of the case. In *Robinson*, the officer testified regarding his state of mind when he searched Robinson: "I just searched him. I didn't think about what I was looking for. I just searched him."[319]

The en banc District of Columbia Court of Appeals first remanded the case to the trial court for a further factual hearing on issues the court concluded were raised on appeal but not sufficiently put before the trial court. On remand, the trial court was to address the scope of the search made in this case "and whether departmental practice or regulations require the arresting officer in every case to search the person of the arrestee thoroughly and completely at the point of arrest in order to assure the safety of both."[320]

On remand, the Government produced Sergeant Dennis C. Donaldson, an experienced police officer and instructor in the Training Division of the Metropolitan Police Department, to testified regarding police practices and training. He was asked whether there any training was done as to whether an officer who makes an arrest should ponder the alternative possible reasons for making a field search. He responded in the negative, stating: "The time area is critical and if the officer tried to reason now I am searching for this and now I am searching for that we feel he would be subjecting himself unduly to risk of injury."[321]

He explained that this meant that an officer is trained to locate and seize items that are potential weapons and evidence without carefully considering whether in fact there are. As an example, he offered that officers are trained to take ballpoint pens without trying to decide whether specific suspects will use them against officers, use them against themselves, or whether they are evidence. "We just teach them to react and take it."[322] The prosecutor, summarizing his understanding the Government's testimony, explained to the trial judge:

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[319] United States v. Robinson, 471 F.2d 1082, 1089 (D.C. Cir. 1972).

[320] United States v. Robinson, 447 F.2d 1215, 1221-1223 (D.C. Cir. 1971) (en banc).

[321] Brief for the United States-Petitioner at 20-21, *Robinson*, 414 U.S. 218 (1973) (No. 72-936), 1973 WL 173865.

[322] *Id.* at 21.

> [A]n officer on the street, once he makes an incustody arrest does not stop to ponder the various purposes that might be conjured up later by some lawyer for making the arrest and search. He is taught at the academy that he has the right to make a thorough search once the subject is placed in custody . . . . The officer doesn't stop and conduct the mental gymnastics of trying to think maybe he has a weapon he can use against me, maybe he has something that he can harm himself with or maybe he has some evidence on him and, therefore, I am going to make the search for these three reasons . . . . [T]here just isn't time for officers to pause and think about the purposes. They are taught to react . . . . They are taught that there are three purposes for searching but the academy does not attempt to tell the officer to stop and think about these various purposes when he must react very quickly to a particular situation.[323]

Although the Government did not explicitly make this point in *Robinson*, it was clearly arguing that field arrest situations by their nature did not permit the sort of intellectual scrutiny that the Government saw Robinson as arguing the law should encourage and perhaps demand.

Quite likely, the *Robinson* majority agreed. This may well explain why the Court so strongly and unnecessarily stressed that in the search incident to arrest context, the reasonableness of a search does not depend on the officer's subjective motivation.[324]

If this is persuasive in the *Robinson* situation, how many more law enforcement decisions may by their nature make subjective reasoning an unrealistic objective?

To the extent that this is in fact the case, perhaps the problem can be handled by limiting any requirement of proper motivation to those situations in which case specific justifications are required. In *Buie* sweep situations, for example, no case specific justification is required for examination of locations immediately adjoining the arrest where concealed persons might be located.[325] Reasonableness then might impose no requirement of proper motivation, beyond awareness that an arrest or other action sufficient to trigger the right to search has been taken. But a broader sweep of the premises requires at least an objective for fearing harm from others on the premises. In addition, reasonableness might properly require a showing that a sweep was in fact motivated by actual concern of this sort.

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[323] Appendix, at 91-92.

[324] *Robinson*, 414 U.S. at 235-36.

G. *Costs of a Partially Subjective Standard: Expeditions into the Minds of Police Officers*

Opponents of incorporating subjective standards into Fourth Amendment law have stressed the costs of applying Fourth Amendment standards requiring consideration of the states of mind of the officers whose actions are challenged. They have made almost a mantra of Justice White's *Painten* warning that such expeditions into the minds of police officers would constitute "a grave and fruitless misallocation of judicial resources."[326]

The basic concern is that such inquiries would always or at least usually be timeconsuming and further would seldom produce accurate results. This is on its face a strained argument as applied to criminal litigation, given that the substantive standards for criminal liability are based on the assumption that it is both appropriate and possible to inquire into the minds of those accused of crime. There is no obvious reason why expeditions into the minds of police officers should be any more difficult or expensive than those into the minds of offenders.

Further, the Supreme Court's case law itself provides little support for the claim. None of the cases involved a careful and structured effort to determine the precise state of mind of the officers involved. Certainly the Court could not say that its own cases demonstrate the futility of expeditions into officers' states of mind.

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[325] *See* Maryland v. Buie, 494 U.S. 325, 337 (1990).

[326] *See supra* note 52 and accompanying text.

Perhaps more fruitful conclusions could be drawn from the experience of the Oregon courts, in which inquiries into officers' states of mind have been required since at least the Oregon Supreme Court's holding in 1986 that under the state constitution the requirement of probable cause has a subjective as well as an objective component.[327] The reported decisions indicate that the subjective components of the state constitutional requirements have been the subject of extensive litigation. A considerable number of those decisions appear to turn on conclusions by trial or appellate courts—or both—that officers acted without the necessary subjective states of mind. While generalization is risky, such determinations appear to be less common in recent years.

Amazingly, not until 1997 did the Oregon Supreme Court make clear that the prosecution could show that officers acted with the required subjective states of mind by means of evidence other than the explicit testimony of the officers themselves. In *State v. Belt*,[328] the court held that circumstantial evidence—specifically in *Belt* the officer's conduct after receiving information—could permit an inference that the officer subjectively suspected the suspect of having committed an offense.[329]

Although the case law disclaims reliance upon "magic words" in the prosecution's testimony, the appellate opinions suggest some emphasis upon the terminology chosen by the testifying officers. In *State v. Dowdy*,[330] for example, the question was whether the officer, before tests on a white powder were run, subjectively concluded it was in fact a controlled substance. Upholding a trial court finding that the officer did not form that belief, the court of appeals noted that the officer in his testimony never said that at that point he believed the white powder was a controlled substance. It rejected the prosecution's argument that testimony that any experienced police officer would have reached this conclusion compelled the inference that this officer must have done so.[331]

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[327] *See supra* note 9 and accompanying text.

[328] 932 P.2d 1177 (Or. 1977).

[329] *Id.* at 1180 (finding officer's conduct in approaching suspect whom complainants said had solicited them for sex in exchange for money, where no evidence provides a contrary explanation for that conduct, supports the inference that the officer subjectively believed the suspect committed a crime).

[330] 844 P.2d 263 (Or. Ct. App. 1992).

Whether an officer had probable cause before administering sobriety tests was at issue in, among other cases, *Winroth v. DMV*.[332] The officer testified he was not sure he had probable cause until after the suspect had performed the tests, although he also stated that if the suspect had refused to take the tests he would have thought the suspect had something to hide and "probably would have arrested him." The court of appeals concluded this testimony failed to show that the officer in fact determined he had probable cause and thus grounds for an arrest. Under the testimony, the suspect never in fact refused the tests and thus the testimony did not establish that the officer in fact made that subjective determination.[333]

Where an officer is shown to have failed to act on what the prosecution claims later was a decision that permitted action, the Oregon courts have found the lack of the required subjective mental state. In *State v. Meier*,[334] the officer observed Meier with a notebook containing notations that might have been records of drug sales. He approached Meier, obtained his name, and asked for consent to search Meier's nearby car. Meier refused. The officer withdrew but remained nearby, anticipating that Meier would drive off and planning to then arrest him for driving on an suspended license. When Meier did not drive off, the officer contacted Meier's parole officer who authorized the officer to take Meier into custody. The officer never testified he believed he had probable cause to believe Meier engaged in drug trafficking. The court of appeals concluded the prosecution had failed to justify the detention as an arrest based on probable cause to believe Meier committed a drug offense violation.[335] It explained:

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[331] *Id.* at 265.

[332] 915 P.2d 991 (Or. Ct. App. 1996).

[333] *Id.* at 995.

[334] 929 P.2d 1052 (Or. Ct. App. 1996).

> [T]he officer's conduct demonstrated that he did not believe he had probable cause to arrest. On defendant's initial refusal to consent, the officer withdrew and watched from a distance, hoping to conduct a search by arresting defendant for a traffic offense. When defendant did not leave and the officer learned of defendant's parole status, the officer contacted the parole officer in order to proceed. Those were not the actions of someone who subjectively believed that he had probable cause to arrest on a drug or weapons charge.[336]

All in all, the Oregon appellate case law does not demonstrate that the state's expeditions into officers' states of mind is "a grave and fruitless misallocation of judicial resources." It does suggest that search and seizure standards with subjective components pose difficult problems for courts. Nothing, however, indicates that these problems are any worse or more frequent than other complex fact questions raised by search and seizure law.

The Oregon case law does suggest that in busy trial court litigation, the parties and the court seem to have some difficulty identifying and focusing in upon subjective considerations. Trial judges appear reluctant to make specific findings of fact that identify and resolve what on appellate review become significant matters of contention. This, of course, complicates appellate review.

H. Costs of a Partially Subjective Standard: Blurring of "Bright Line" Rules

Interjecting a subjective element into Fourth Amendment reasonableness, the United States argued in *Brigham City*, would—at least in the context of emergency entries—"necessarily import variability and instability into the law."[337] This, in turn, would reduce the value of case law in providing guidance to officers and invite offensively inconsistent applications of the law.[338]

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[335] *Id.* at 1052-55.

[336] *Id.* at 184.

[337] Brief for the United States as Amicus Curiae Supporting Petitioner at 19,

Precisely how the addition of a subjective component to a Fourth Amendment standard would have this effect was not developed by the Government. In the abstract, at least, no incremental ambiguity is added by inserting a subjective component, if that is carefully defined. If an officer understands the objective component of probable cause, for example, it is unlikely that an officer would fail to understand what is meant by a requirement that the officer conclude that probable cause exists.

Perhaps the problem is uncertainty as to what objective manifestations of a state of mind are required to assure that the prosecution will later be able to persuade a court that the state of mind actually existed. The officer in *Meier*, discussed in the last section, might for example be left unclear as to what he is required to do if he decides that probable cause exists but nevertheless wishes to also pursue some other alternative, such as detention for violating a parole condition.

Quite likely, however, the real source of complaint is not the subjective nature of the new component. If the objective component demands only a showing that a reasonable officer could have formed a particular belief, the addition of a subjective component demanding proof that the officer actually did form this belief increases the burden on the prosecution. But this increase comes from the movement from a "could have" standard to a "did" one, not from an objective standard to a partly subjective one.[339]

Brigham City v. Stuart, 122 P.3d 506 (Utah 2006) (No. 05-502).

[338] *Id.*

[339] In *Brigham City*, the Government urged a standard that would require only a showing that the facts support a reasonable belief. *Id.* at 17. This is essentially a "could have" standard.

III. Conclusion: Give Subjectivity A Chance

On balance, and despite the increasing hostility of the Supreme Court to this position, Fourth Amendment standards should contain an initial subjective component. When in litigation the prosecution defends law enforcement conduct as reasonable, it should be limited to those general legal theories it can prove were actually and subjectively within the analysis engaged in by the officers in deciding to take that action.

This is not because the nature of reasonableness somehow conceptually requires that officers have been motivated by the legal grounds later relied upon in litigation. Nor it is because officers' analyses significantly impact the intrusiveness of the searches and seizures. Rather, it is because such a definition of reasonableness is likely to further the effectiveness of Fourth Amendment law, including the exclusionary sanction, in preventing law enforcement conduct that unjustifiably intrudes upon Fourth Amendment protected interests.

There is virtual agreement that Fourth Amendment law should encourage officers to behave constitutionally by condemning their conduct as unreasonable when they fail to so behave. There is similar agreement that this means the prosecution should be able to defend the admissibility of evidence only on the basis of those facts subjectively known to the officers. Clearly we are agreed that we should use Fourth Amendment law to encourage officers to fully develop their subjective knowledge of the facts that would support intrusive action by them.

No court or commentator has provided a satisfactory rationale for stopping there. We seem to be agreed that ideally officers should have some subjective knowledge of the law defining when they can—in Fourth Amendment terms—reasonably act intrusively. And we seem to be agreed that ideally officers should apply this known law to the known facts and act only after deciding that this application indicates their actions would be reasonable.[340] Why not make clear to officers that they must know the law as well as the facts and have the ability to apply that law to the facts we demand they know?

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[340] The reasonable officer who is the benchmark of an objective criterion is one

The absurdity of what passes for analysis was obvious in *Devenpeck*, when the Government argued that for some unspecified reason Fourth Amendment law could acceptably consider what information goes into officers' minds but could not look to what comes out of their minds.[341]

Professor LaFave fears that requiring knowledge of the law is too ambitious and will unrealistically demand that police officers act in the field like constitutional lawyers presenting argument to exalted appellate courts. This potential problem can be avoided by requiring only awareness of the general legal theory. Basic concepts of probable cause and reasonable suspicion should not be beyond the capacities of officers. If they are, those concepts need to be revised.

Since Justice White's warning in *Painten*, there has been a widespread assumption that case-by-case inquiry into officers' states of mind would be impractical. It will be difficult and often produce inaccurate findings. In any case, it will take too long to be worth the cost.

There is absolutely nothing to support this assumption. Common sense suggests is it without support. Modern substantive culpable mental state requirements for conviction of offenders have not clogged the courts. There is nothing to suggest that law enforcement officers are more inscrutable than those who commit antisocial acts.

Officers may be tempted to take liberties with the truth in their testimony. Some may give in. Some undoubtedly do now in litigation applying so-called objective standards. Nothing suggests that police perjury would be worse under a system applying standards with a subjective component.

The Supreme Court itself has acknowledged that ascertain-

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with "a reasonable knowledge of what the law prohibits." United States v. Leon, 468 U.S. 897, 919 n.20 (1984) (quoting United States v. Peltier, 422 U.S. 531, 542 (1975)); *accord*, *id.* at 922 n.23 (stating that inquiry is "whether a reasonably well trained officer would have known that the search was illegal").

[341] *See supra* text accompanying note 243.

ing what a reasonable officer would know or believe in a specific situation is probably more difficult than ascertaining what a specific officer knew or believed.[342] Quite clearly, the Court itself has at least sometimes rejected Justice White's colorful but unsupported *Painten* warning.

Would such an approach make any difference? It might. Or at least there is little reason to fear that this would make any less difference than other positions the law embraces as a matter of Fourth Amendment doctrine.

What about costs in terms of loss of reliable evidence of offenders' guilt? There is really a strong argument that society has no legitimate interest in being able to benefit from information acquired only because law enforcement officers mistakenly judged the constitutional reasonableness of their planned activity. Any such loss may be an appropriate one.

But the problem can be minimized by adopting the second part of the proposal set out earlier: The prosecution can defend the reasonableness of law enforcement action on the basis of a legal theory not within the officers' own subjective analysis of the situation if it establishes the applicability of a version of inevitable discovery. To do this, it must show that had the officers not proceeded on the legal conclusion they actually relied upon, they would have considered the other legal theory, decided it applied, and acted in reliance on that theory.

Any such approach would have to be developed and applied with sensitivity to the risk that as applied to some types of law enforcement activity it pursues an unrealistic objective. In some contexts, Fourth Amendment law may simply be unable to realistically demand that law enforcement action be the product of officers' relatively careful application of the law to the known facts.

Where this turns out to be the case, Fourth Amendment law should be carefully molded to accommodate this. Essentially this is what was done in *Robinson*. The Court clearly concluded that the realities of law enforcement practice meant that officers could not be expected, on a case-by-case basis, to consider whether the basis for the arrest gave rise to enough reason to fear the presence of weapons or destructible evidence to justify an incidental search.[343] This was easily accommodated by making the reasonableness of a search of an arrestee's person turn simply upon the occurrence of an arrest. Since Fourth Amendment law required no case-specific facts indicating the presence of weapons or evidence, there was no basis for arguing that officers should have to subjectively regard the search as necessary to locate such weapons or evidence.

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[342] Whren v. United States, 517 U.S. 806, 815 (1996) (finding that "it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act").

Arguably the Court has taken the same approach to removal of occupants during a traffic stop. Given how critical the decision to remove the occupants from a vehicle may be to the safety of the officers, Fourth Amendment law arguably cannot realistically demand that officers be required to consider in each individual case whether objective standards for removal of occupants are met. This was resolved in *Pennsylvania v. Mimms*[344] and *Maryland v. Wilson*[345] by holding that Fourth Amendment law required for such action only that a reasonable traffic stop had occurred. No objective case-specific justification for the removal is required, and hence the officers need not be shown to have subjectively relied upon any case-specific justification.

The Supreme Court appears to assume that law enforcement officers will learn and comply with basic Fourth Amendment law. It has, however, been unwilling to define Fourth Amendment reasonableness so as to require case-by-case consideration of whether officers have in fact done this. A Fourth Amendment approach to reasonableness that embraced a subjective component would demand that courts examine whether officers are living up to the Court's implied expectations. This might well have the not-insignificant benefit of calling the courts' attention to Fourth Amendment requirements or analyses that simply cannot be understood and applied by officers and thus need to be modified.

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[343] *See* Robinson v. United States, 414 U.S. 218, 235 (1973).

[344] 434 U.S. 106 (1977) (concerning driver).

[345] 519 U.S. 408 (1997) (concerning passenger).

Brigham City probably reflects that the Supreme Court will not consider such an approach even if areas where other Fourth Amendment restrictions are minimal. But state courts considering whether to follow this same approach as a matter of state law should note the manner in which this Fourth Amendment law developed. There are good reasons why search and seizure standards should have subjective components and the Supreme Court has never given those fair consideration.

THE EXPRESSIVE FOURTH AMENDMENT: RETHINKING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

Andrew E. Taslitz[*]

I. Introduction

The United States Supreme Court has repeatedly and forthrightly declared that "subjective purpose"—what was in the hearts and minds of individual police officers—can have no relevance to determining the reasonableness of a search or seizure under the Fourth Amendment.[1] That an officer stops one motorist but not another because of racial animus is of no moment.[2] That an officer stops and frisks a young man primarily to assert "the power image of the beat officer," rather than because of actual subjective suspicion of that young man's ongoing criminality, is likewise outside the ambit of the Fourth Amendment's concerns.[3] In both instances, so long as there was objectively reasonable suspicion of criminality that *could have* justified these searches and seizures, what really motivated the officers conducting them does not matter.[4]

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[1] *See* Andrew E. Taslitz & Margaret L. Paris, Constitutional Criminal Procedure 374-79, 441-45 (2d ed. 2003) (summarizing cases).

[2] *See id.* at 441-45; Whren v. United States, 517 U.S. 806 (1996) (holding that alleged police racial animus is irrelevant, as is any other sort of subjective pretext, under the Fourth Amendment).

[3] *See* Terry v. Ohio, 392 U.S. 1, 15 n.11 (1968). *Terry* was decided before the Court had flatly declared a Fourth Amendment inquiry into subjective pretext

Yet the Court has equally made it clear that varying notions of "*objective* purpose" are at the heart of several central Fourth Amendment doctrines.[5] Here I focus on one of those doctrines: the good faith exception to the exclusionary rule.

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irrelevant in its 1996 *Whren* decision. Nevertheless, the *Terry* Court spoke of, and rejected, an inquiry into the hearts and minds of police officers. Said the Court,

> While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is *"motivated by the officers' perceived need to maintain the power image of the beat officer*, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."

Terry, 392 U.S. at 15 n.11 (citations omitted) (emphasis added). However, continued the Court, this "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." *Id.* at 14-15. Application of the exclusionary rule to stamp out ill police motives, concluded the Court, would be a "futile protest against practices which it can never be used effectively to control." *Id.* at 15. Still, the Court seemed to recognize an obligation not to stamp out unacceptable police *motives* but to respond to the objectively-imposed humiliating *messages* that excessive stop-and-frisk activity might impose. As the Court explained, "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.* Using moralistic-sounding language recognizing the expressive power of the police and of the courts, the Court concluded: "When such conduct is identified, *it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." Id.* (emphasis added).

[4] *See* TASLITZ & PARIS, *supra* note 1, at 441-45.

[5] For example, "administrative" or "special needs" searches and seizures can often be warrantless and suspicionless and are defined as those having a "programmatic purpose" other than criminal law enforcement. *See, e.g.*, Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in* Ferguson v. City of Charleston, 9 DUKE J. GENDER L. & POL'Y 1, 26-40, 62-77 (2002). This special needs category embraces a wide range of search and seizure activity: from roadblocks and drug-testing, to probationer home visits, records examination of pervasively regulated industries, border searches, inventory searches, administrative fire marshal warrants, and health and safety inspections. *See* TASLITZ & PARIS, *supra* note 1, at 361-402.

That exception declares that even unreasonable searches and seizures violative of the Fourth Amendment will not result in suppression of evidence *if* it was discovered in "objectively reasonable" good faith reliance on a search warrant.[6] A phrase like "good faith" implies in common and much legal usage, however, an entirely subjective, interior state of mind.[7] What can it mean, therefore, to say that "good faith" must be determined "objectively," and why still use a phrase like "good faith" that ordinarily connotes greater moral culpability than simply unreasonable, that is, negligent, conduct? The Court's answers to these questions are vague and incomplete. Nevertheless, a close reading of the leading case law suggests that the Court's doctrine can best be understood as an effort to regulate the "expressive function" of policing; that is, the ways in which police exercise of the power to search and seize sends powerful messages about human worth, fundamental political values, and the nature of American peoplehood.[8] It is the actions of and messages sent by the police as an entity, rather than of any individual officer, with which the Court is most concerned. My central thesis is that the Court sees the exclusionary rule, at least as it is understood in *United States v. Leon*,[9] as partly serving the function of condemning the institutional *moral* culpability of the police.[10] Where the police as an entity lack such moral culpability—a culpability gauged by the nature and intensity of the degrading messages that their conduct sends—they act in "good faith" and do not, therefore, merit the "punishment" of exclusion. All the Court's language of "deterrence" as the primary purpose of the exclusionary rule seems incomplete when judged in light of this aspect of the *Leon* rationale. Furthermore, deterrence is best understood in this context as deterring morally condemnable police conduct.[11] Similar moral condemnation of an entity arises in a sister area of law—corporate criminal liability—and I will further argue here that an analogy to such liability sheds light on the Court's approach to good faith and suggests refinements to the latter doctrine.

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[6] *See* TASLITZ & PARIS, *supra* note 1, at 547-48 (reviewing good faith exception's contours); *infra* text accompanying notes 20-130 (elaborating on the exception in greater detail).

[7] *See infra* text accompanying notes 42-44.

[8] For more on this expressive function and its role in Fourth Amendment analysis, see generally Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002) [hereinafter Taslitz, *Fourth Amendment Disrespect*] (concerning racial profiling, immigration searches, flight-based reasonable suspicion, and immigration seizures); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006) [hereinafter TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT] (arguing history supports seeing the Fourth Amendment as primarily regulating expressive political violence by the state).

[9] 468 U.S. 897 (1984).

[10] I am not using the term "moral" in some broad sense of whether a police department can be labeled "good" or "bad" much like we might make a character assessment of a natural person. Rather, I am referring to *political morality*, those

Under one version of the justification for corporate crimi-

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moral principles that our society expects to govern state actors' public behavior in our constitutional scheme of government. *See, e.g.*, Taslitz, *Fourth Amendment Disrespect*, *supra* note 8, at 2282-84 (reciting principles of political morality under the Fourth Amendment). The sort of moral principles enforced by the criminal law are not identical to principles of political morality because the criminal law reaches purely private actors' conduct in addition to that of the state. Yet both sorts of moral principles aim at regulating expressive conduct injurious to the public good rather than merely to private interests. *See* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech,* 1 MD. L. J. OF RACE, RELIGION, GENDER & CLASS 305, 320-24, 330-35, 342-55 (2001) [hereinafter Taslitz, *Civil Society*] (comparing public versus private retributive principles of political morality). Furthermore, as will be explained shortly, the moral principles at work in corporate criminal liability and police suppression liability in the context of the good faith exception to the exclusionary rule are sufficiently similar that each might shed light on the other. *Cf.* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (2006) (arguing that white collar and corporate criminal liability can only be sensibly explained by the confluence of three factors in each case: a wrongful act, a harm, and breach of a moral principle specific to that area of criminality, such as the prohibitions on deception, cheating, coercion, exploitation, disloyalty, and promise-breaking). Sharon Davies has made an analogous argument to mine, though without specifying the precise factors that should help in proving good faith, nor analyzing the importance of entity over individual liability, nor making the corporate criminal liability analogy. *See* Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?,* 73 S. CAL. L. REV. 1275 (2000) (arguing that the exclusionary rule is best understood as a "sanction" designed to communicate messages of "wrongful" police behavior rather than a "price" imposed for engaging in inefficient conduct).

[11] *See infra* text accompanying notes 36-71.

nal punishment, each corporation is unique, a distinct entity with its own personality. That personality and the accompanying existence of a corporate mens rea inhere in the corporation's policies, structure, and actions. Corporate character and mens rea are not fictions but social realities and are understood as such by the American people. When corporations act with indifference to human worth, they send a message inconsistent with equal human dignity—a message that can be nullified only by the special power of condemnation inherent in criminal punishment.[12] My argument here is that the Court's concept of "good faith" articulated in *Leon* embraces a similar notion of the moral culpability of an entity—in this case, the police—whose actions can send degrading messages about human worth. Imposing criminal entity liability on society's primary enforcers of the criminal law (police departments) is, however, neither practical nor necessary. Instead, the Court sees the exclusionary rule as nearly as effective a way as criminal punishment for rejecting state messages of human degradation.[13]

Furthermore, for the Court, the necessary moral culpability must be assumed whenever the police engage in an unconstitutional *warrantless* search and seizure. But when the police have gone to the trouble of seeking advance judicial review by obtaining a warrant, the Court reverses this presumption, assuming that an unconstitutionally-issued warrant reflects at most mere tort negligence by the police, thus not requiring the criminal-law-like condemnatory punishment of the exclusionary rule. Such punishment, as with criminal punishment of corporations under a character-based theory of corporate liability, should, in this reading of the Court's view, be reserved *only* for instances of gross, that is, criminal, negligence, or for still more culpable mental states, such as recklessness, knowledge, and purpose.

The Court's re-conceiving of the exclusionary rule as a form of condemnatory punishment of unconstitutional police action is incomplete. The Court still pays lip service to deterrence as a goal of exclusion and certainly gives some version of deterrence weight. But the primary concern with the moral culpability of the police and the expressive function of their conduct, I will argue, is implicit in the *Leon* opinion and is not identical with traditional understanding of the deterrence goals. I will also argue that the Court's seeming attachment to multiple goals (despite its protestations of overriding commitment to the one of deterrence) and its confusing and half-hearted commitment to any single, clear rationale for the exclusionary rule lead to inconsistent doctrinal outcomes and vague opinions. I do not maintain, therefore, that the analogy between corporate criminal liability and the good faith exception is a perfect fit or that the concepts are identical. But I do suggest that the analogy is an enlightening one.[14]

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[12] *See infra* text accompanying notes 144-202.

[13] *See infra* text accompanying notes 19-143.

In particular, courts, legislatures, and theorists wrestling with how to identify and rank degrees of corporate mens rea have come up with a list of very specific indicators of the culpability of entities and very specific actions that these entities can take to protect themselves from liability. These indicators, it turns out, with slight modifications, are also good measures of the moral culpability of police departments for unconstitutional searches and seizures by individual officers.[15] Happily, the corresponding suggestions for how police departments can avoid being found culpable in such circumstances show how a stricter adherence to the moral culpability model posited here will do a better job at deterring police wrongdoing than does the current weaker, muddled version of the good faith exception. I am no fan of the good faith exception for a variety of reasons, including my belief that suppressing unconstitutionally seized evidence serves important expressive and other functions beyond simply punishing the police.[16] Nevertheless, if the exception is to continue its life, as it undoubtedly will, an energetic commitment to an expressive, condemnatory model of police punishment via the exclusionary rule will do far more good than the feint-hearted version of the rule now embraced by the Court.

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[14] *See infra* text accompanying notes 228-365.

[15] *See infra* text accompanying notes 228-365.

[16] *Cf.* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 685-91 (explaining how a properly-applied exclusionary rule can prompt police in the area of eyewitness identification to make use of the latest scientific research in ways least prejudicial to crim-

After this Part I introduction, this article will proceed in three primary parts: in Part II, first, an examination of aspects of *Leon*'s rationale that highlight implicit emphases on moral culpability; second, in Part III, an overview of the law and theory of corporate—as opposed to individual—criminal liability; and third, in Part IV, an explanation of how corporate liability sheds better light on the soundest meaning of the good faith exception to the exclusionary rule. Along the way, I will explore the significance of post-*Leon* decisions for my thesis. My analysis, if accepted by the Court, would lead to greater judicial intrusiveness into policing by creating stronger incentives for police departments to discourage Fourth Amendment violations by individual officers. On the other hand, the courts would leave police wide discretion in going about this task, and police compliance would give them a safe harbor for avoiding the shoals of the exclusionary rule. The greater intrusiveness aspect of these recommendations would likely lead this Court, I suspect, to shy away from fully embracing the implications of *Leon*'s logic. Nevertheless, some state courts acting under their state constitutions might be more receptive to incentives-based institutional reform of police search and seizure practices, as these courts have recently been concerned with other sorts of police practices.[17] Furthermore, the safe harbor aspect of these proposals might garner enough political support for legislative action in some states and might even prove attractive enough to certain police departments to encourage self-reform and, where that has

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inal suspects); *see infra* text accompanying notes 356-61.

[17] *See* Kruse, *supra* note 16, at 685-91 (explaining analogous point); State v. Dubose, 699 N.W.2d 582 (Wis. 2005) (using state constitution's due process clause to promote police institutional change concerning the risk of convicting the innocent).

happened, advocacy on behalf of this modified good faith exception by local prosecutors might occur.[18] At a minimum, the analysis here will, I hope, at least foster debates over the current good faith exception's wisdom in ways that will shed new light on that doctrine. That new light must, however, first be shone on *Leon*.

II. *UNITED STATES V. LEON*

A. *The Majority Opinion*

For my purposes, the precise facts of *Leon* do not matter. All parties there had effectively agreed for purposes of the appeal to the United States Supreme Court that that case involved a search of homes and cars, and a resulting seizure of drugs, pursuant to a warrant that was *not* based on probable cause. The Government's petition for certiorari presented this question: "[W]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective."[19] The Court answered this question in the affirmative, concluding that, "in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions."[20]

The intended function that the Court claimed to be the primary one was that of deterring police violations of Fourth Amendment rights. This purpose was not to be pursued single-mindedly, however, for the degree to which exclusion of relevant evidence fosters the benefit of reduced police misconduct must, said the Court, be weighed against the "substantial social costs exacted" by an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude" that "impede unacceptably the truth-finding functions of judge and jury."[21] To let the guilty go free or to plea bargain for reduced sentences because of the defense's using the hammer of the suppression motion to enhance its defense bargaining power would, the Court concluded, generate "disrespect for the law and administration of justice," at least where police transgressions were minor or were done in objectively reasonable good faith.[22]

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[18] *Cf.* Kruse, *supra* note 16, at 690-91, 696-718 (recounting factors that encourage law enforcement and other stakeholders to buy into institutional reform).

[19] United States v. Leon, 468 U.S. 897, 905 (1984).

[20] *Id.*

"Substantial and deliberate" violations, the Court agreed, require a stiff sanction to deter police wrongdoing.[23] But such deterrence is unlikely significantly to be advanced where the police have acted in objectively reasonable good faith pursuant to a warrant. A good faith exception to the exclusionary rule would, said the Court, also encourage police resort to warrants, while magistrates can be trusted to issue such warrants only when proper. Indeed, for this reason, the Court explained, it has always declared that the magistrate's judgment to issue a warrant is entitled to great deference.[24] Magistrates can be administratively sanctioned adequately by intra-judicial branch methods in the rare cases where they go too far. Penalizing the police for the magistrates' improper performance of their duties makes no sense because "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."[25]

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[21] *Id.* at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

[22] *Id.* at 907-08 (quoting in part Stone v. Powell, 428 U.S. 465, 491 (1976)).

[23] *Id.* at 908-09. In retrospect, *Leon*'s insistence on punishing "deliberate" violations seems odd given the Court's later unequivocal rejection of the relevance of inquiries into individual officers' subjective mental states for any Fourth Amendment purposes. *See supra* text accompanying notes 1-4. Moreover, the Court's initial justification for its good faith approach in *Leon* is that good faith searches are not deliberate, therefore in no need of deterrence. But today, whether a violation is deliberate would not matter, so "deliberate" violations are not necessarily subject to the exclusionary sanction. That then begs the question, "What violations are still subject to the exclusionary sanction?" While providing no overarching answer to this question, the Court's actions suggest the following response: "very few." *See, e.g.*, Margaret L. Paris & Andrew E. Taslitz, *Catering to the Constable: The Court's Latest Fourth Amendment Cases Give the Nod to Police,* 19 A.B.A. SEC. CRIM. JUST., Fall 2004, at 5.

[24] *See Leon*, 468 U.S. at 914; *see also* Illinois v. Gates, 462 U.S. 213, 236 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts" (internal quotations omitted).).

Similarly, police who act in good faith could not have, and therefore will not in the future have, their behavior altered by suppression, unless exclusion makes them less willing to do their duty, an undesirable outcome. Quoting *Michigan v. Tucker,* the Court explained:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."[26]

The Court concluded that this weakening of the deterrence rationale was particularly true where officers acted in objectively reasonable good faith reliance on a warrant. In such circumstances, "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[27] Suppression of evidence obtained pursuant to a warrant should be ordered, therefore, "only in those *unusual* cases in which exclusion will further the purposes of the exclusionary rule."[28]

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[25] *Leon*, 468 U.S. at 917. Of course magistrates can be lay people, who are neither judges nor lawyers. *See* Shadwick v. City of Tampa, 407 U.S. 345, 347 (1972). They also face powerful political pressures to approve warrant applications, even in the face of questionable showings of probable cause. *See, e.g.*, Taslitz, *Fourth Amendment Disrespect*, *supra* note 8, at 2293-98 (discussing the powerful political pressures that successfully prodded district court Judge Baer to reconsider his granting of a suppression motion).

[26] *Leon*, 468 U.S. at 919 (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)). *Tucker* was a *Miranda*-rule case rather than a Fourth Amendment one. *Tucker* held that, where the police acquire the name of a potential witness from a defendant in the course of obtaining a *Miranda*-violative statement, the testimony of that witness will not necessarily be excluded pursuant to the exclusionary rule, even though the defendant's statements themselves will be excluded. *Tucker* proved to be a harbinger of things to come, with more recent case law further dramatically narrowing the scope of the exclusionary rule in the *Miranda* context. *See* TASLITZ & PARIS, *supra* note 1, at 671-72 (summarizing case law); ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE SECOND EDITION 2005 SUPPLEMENT 99-103 (2005) [hereinafter 2005 SUPPLEMENT] (further summarizing still more recent precedent).

The Court cataloged four examples of such "unusual" cases. Repeatedly, the Court declared that it "eschew[ed] inquiries into the subjective beliefs of law enforcement officers,"[29] warning that "'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless mis-allocation of judicial resources.'"[30] Its four major purportedly "objective" examples of unreasonable police reliance included these: (1) where the magistrate has "wholly abandoned his judicial role," acting more like a police officer than a neutral member of the judiciary; (2) where the affiant's statements in obtaining the warrant were knowingly false or made in reckless disregard of the truth; (3) where the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant is so "facially deficient" in failing to particularize the places to be searched or the things to be seized that "the executing officers cannot reasonably presume it to be valid."[31]

Leon thus purported to embrace a concept of *objectively reasonable* good faith, and, at one point, in quoting the *Tucker* case, the Court momentarily sounded like ordinary tort negligence by the police was sufficient to show unreasonable conduct.[32] A careful reading of the portions of the majority opinion just summarized, viewed in light of additional language in that opinion, and seen in the context of the dissenting Justice's critiques and several of the Court's later holdings on the subject, demonstrate, however, that the Court in fact made far more culpable conduct—at least at the level of gross or criminal negligence—a pre-requisite to suppression pursuant to a warrant.[33]

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[27] *Leon*, 468 U.S. at 921.

[28] *Id.* at 918 (emphasis added).

[29] *Id.* at 922-23 n.23.

[30] *Id.* at 923 n.23 (quoting Massachusetts v. Painten, 398 U.S. 560, 565 (1968)).

[31] *See id.* at 923-24, 926. In crafting these exceptions, the Court respectively cited *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (magistrate accompanying police to search site to determine what material could be seized as obscene rendered the magistrate an "adjunct law enforcement officer"); *Franks v. Delaware*, 438 U.S. 154 (1978) (placing the burden on the defendant to show that an otherwise apparently proper warrant should be invalidated because the statements in the supporting affidavit were knowingly false or made in reckless disregard of the truth); *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part) (noting importance of indicia of probable cause); *Massachusetts v. Sheppard*, 468 U.S. 981, 988-91 (discussing facial deficiencies).

Moreover, although the Court's rejection of subjective mental state inquires was incomplete, as I will explain shortly, yet it also emphasized a concept of moral culpability judged primarily at the level of the police department as an entity rather than at the level of the individual officer.[34] I will address three major arguments here that the Court adopted a standard of culpability akin to at least criminal negligence while still being under the influence of some subjective culpability residue: first, its choice of the "good faith" moniker rather than simply one of negligence; second, its frequent use nevertheless of other, subjective terminology; and third, its articulation of a standard of reasonableness that sets a bar too high to constitute ordinary negligence—indeed that is thoroughly inconsistent with mere ordinary tort negligence, which is, after all, likely what is required to find any substantive Fourth Amendment violation in the first place.[35]

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[32] *See supra* text accompanying notes 26-27 (noting *Tucker* reference to exclusion's deterring "at the very least negligent . . . conduct").

[33] *See infra* text accompanying notes 36-131 (supporting this proposition).

[34] *See infra* text accompanying notes 62-71.

[35] *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 32-40 (1997) [hereinafter AMAR, CRIMINAL PROCEDURE].

B. Why Leon's *"Good Faith" Test Requires More Than Ordinary Tort Negligence*

1. The Common Everyday and Legal Meanings of "Good Faith"

If the standard the *Leon* Court adopted is one of ordinary tort negligence, then why does the Court label the test one of "good faith?" In ordinary usage, according to the *Microsoft Encarta College Dictionary,* "good faith" means "honesty of intention" or an effort to fulfill an obligation, such as an "effort to fulfill . . . [a] contract."[36] These two related meanings imply both goodness of heart[37] and faith or fidelity to an obligation.[38] Obligations are, of course, owed to others, presupposing actions taken in relationships.[39] Those others can, however, be individuals, organizations, or even nations, for we each, for example, owe fidelity to our spouses, our churches, and our government.[40] To act in bad faith is a grievous moral wrong, involving either a desire to breach important duties or a thoroughgoing indifference to them, revealing a hardness of heart.[41]

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[36] MICROSOFT ENCARTA DICTIONARY 618 (2001) [hereinafter MICROSOFT].

[37] *See, e.g., Wikipedia, the Free Encyclopedia,* http://en.wikipedia.org/wiki/Good-faith (last visited June 28, 2006) ("Good faith . . . is the mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct, even if the conviction is objectively unfounded.").

[38] *See id.* (noting that, in natural law, as in positive law, "good faith" helps to determine the "degree of *right or obligation* prevailing in the various forms of human engagements," being prescriptively "an indispensable requirement . . . of acquiring dominion or freeing oneself from a burden").

[39] *See id.* (listing as examples of good faith only instances of relationships, generally ones of mutual obligation, with others).

[40] *Cf.* GREEN, *supra* note 10, at 98-104 (defining "loyalty" as "being true or faithful to someone or something—having a 'persevering commitment to some associational object,'" which may be an "individual, or group, or institution," or even "causes or ideals"). Acting loyally and acting in good faith are not necessarily the same thing, for, at least in the view of some thinkers, loyal action assumes that the actor has a prima facie obligation to act in another's or a cause's best interests, "even when doing so would be against . . . [the actor's] own self-interest," *id.* at 99, arguably requiring a degree of self-sacrifice well beyond what good faith might require. *Compare id.* at 100-01 (articulating the idea of perseverance or self-sacrifice in the face of obstacles as central to loyalty) *with* MICROSOFT, *supra* note 36, at 618 (never mentioning "self-sacrifice" or "perseverance" in connection with "good faith"). No extended examination of the conceptual differences between loyalty and good faith is, however, necessary. One who is

In law, "good faith" can also connote subjective wrongdoing,[42] yet the phrase can be given a relatively more objective meaning as well, as where the U.C.C. speaks of a duty of "good faith and fair dealing in the enforcement of a contract" or the judiciary speaks of "judging in good faith."[43] In each instance,

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disloyal cannot be said to be acting with "honest intention" or with fidelity of obligation and thus cannot be acting in "good faith." There is sufficient overlap between the concepts to make reference to one instructive in understanding the other. *See* Andrew E. Taslitz, *Foreword: Loyalty and Criminal Justice,* 49 HOWARD L. J. 405, 407-10 (2006) (offering more extended definition of "loyalty"); *cf.* MICROSOFT, *supra* note 36, at 513 (including among its five alternative definitions of "faith," "Loyalty, allegiance or loyalty to somebody or something").

[41] *See* MICROSOFT, *supra* note 36, at 102 (defining "bad faith" as "insincerity, especially as evidenced by actions that do not accord with somebody's stated intentions."); *cf.* OXFORD AMERICAN WRITER'S THESAURUS 324 (2004) (defining the opposite of faith as "mistrust; Disloyal to, be unfaithful to, be untrue to, betray, play someone false, break one's promise to, fail, let down; double-cross, deceive, cheat, stab in the back").

[42] *See, e.g.,* Smith v. State, 13 N.E.2d 562 (Ind. 1938) ("good faith," as used in statute under which a physician was prosecuted for unlawful sale of morphine, was properly defined in a jury instruction as the honest intention that the person to whom narcotics were sold or administered was actually suffering from a physical condition suggesting that use of the narcotics might be in accord with good medical practice); NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485-88 (1960) (defining "good faith bargaining" for purposes of the National Labor Relations Act as being "bound to deal with each other in a serious attempt to resolve differences and reach a common ground," thus requiring "a *desire* to reach agreement" to "encourage an attitude of settlement through give and take" (emphasis added)); United States v. Manchester Farming P'ship, 315 F.3d 1176, 1180 (9th Cir. 2003) (for purposes of awarding attorney's fees pursuant to the "Hyde Amendment," the required showing of "bad faith" meant "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will."); J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 228 (2002) (noting that a good faith, mistaken understanding of what the law requires, even if unreasonable, is generally a defense to tax fraud).

[43] *See* U.C.C. § 1-201 ("'Good Faith,' except as otherwise provided in Article 5, means honesty in fact *and* the observance of reasonable commercial standards of fair dealing"), § 5-102 ("In this article, 'Good faith' means honesty in fact in the conduct or transaction concerned."); *see generally* STEVEN J. BURTON, JUDGING IN GOOD FAITH (1994) (analyzing what it means for a judge to act in good faith and why he or she is obligated to do so). I say a "more" objective meaning because

however, the notion of fidelity to an important obligation to some other person, entity, or even to an idea is involved.[44]

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the law often arguably creates both objective and subjective components to the concept of good faith. *See, e.g.*, STRADER, *supra* note 42, at 65 (noting mail fraud cannot be proven if the defendant acted in good faith, that is, "with good will and without intent to harm," a seemingly entirely subjective test, yet further noting that in the context of claimed good faith reliance on the advice of counsel, such reliance must, in addition to being honest, include the client's full disclosure of material facts to the attorney, a debatably somewhat objective question), 91 (similar analysis of the meaning of good faith in the context of securities fraud); 26 C.F.R. § 1.6664-4(b)(c) (2006) (An honest misunderstanding of the law is relevant to a good faith exception to § 662 tax penalties, but if the taxpayer claims that he relied on professional advice, such reliance "may not be reasonable or in good faith if the taxpayer knew, or *reasonably should have known*, that the advisor lacked knowledge in the relevant aspects of Federal tax law." (emphasis added)). *But see Automobile Suits Against Manufacturers Act,* 15 U.S.C. § 1221 (defining "good faith" in a seemingly purely objective fashion as "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "good faith" as a "state of mind" consisting of such subjective states as "honesty in belief or purpose" or "absence of intent to defraud or to seek unconscionable advantages" *and* objective states, specifically "observance of reasonable commercial standards of fair dealing in a given trade or business" or both); United States v. Brown, 978 F.2d 585 (10th Cir. 1992) (a good faith showing to be released from a desegregation order requires showing a consistent pattern of lawful conduct).

[44] The Restatement of Contracts puts the point this way:

> The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good Faith performance or enforcement of a contract emphasizes *faithfulness to an agreed common purpose* and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. A (1979); *see also* Robert H. Jerry II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1336 (1994) (similar); BLACK'S LAW DICTIONARY, *supra* note 43 (including in one major definition of "good faith" as "faithfulness to one's duty or obligation"). Similarly, in the insurance context, "bad faith" on the part of an insurer often means "any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent." *Wikipedia, supra* note 37 (good faith is frequently applied to determine the *"degree of . . . obligation"*); Dayton Heidelberg Distrib. Co. v. Vineyard Brands, Inc. 74 F. App'x 509 (2003) (describing franchisee's statutory duty of dealing with each other in good faith under Ohio law as acting "in a fair and equitable manner toward each other *so as*

Furthermore, if we do not always look to examine the relevant actor's heart, we do insist that he articulate good and sufficient reasons for his actions, reasons that only someone with good intentions and an abiding sense of concern about the duties he owes would have.[45] Breaching a duty of objectively reasonable good faith thus implies far more than ordinary negligence, smacking of more moral culpability than merely accidental or mistaken conduct.[46]

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to guarantee each party freedom from coercion or intimidation"); *cf.* AHARON BARAK, THE JUDGE IN A DEMOCRACY 65-66 (2006) (describing the mandate to act in objective good faith as a core "principle of substantive democracy," reflecting "'society's fundamental conceptions about proper behavior between people,'" even when acting in their own self-interest (quoting in part Roker v. Salomon, 55 (1) P.D. 199, 279)). Barak believes, however, that the principle of good faith is too low a baseline for public law because "the public authority has a heavier duty than the one derived from the principle of good faith." *Id.* at 66. Nevertheless, his description of this baseline seems an apt guide for minimally acceptable police standards of behavior in the area of search and seizure, if not necessarily in other areas: "Person-to-person, one cannot behave like a wolf, but one is not required to be an angel. Person-to-person, one must act like a person." Roker, 55 (1) P.D. at 279. Barak concedes that the duty of good faith is not as widely recognized as a general minimal standard of behavior in the United States as in many other countries but that it is nevertheless recognized in specific areas of American law. *See* BARAK, *supra,* at 65-66.

[45] *See, e.g.,* BURTON, *supra* note 43, (judging in good faith requires giving good reasons for actions). *See generally* STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995); GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson and Daniel Friedman eds., 1995); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829-30 (1982).

[46] *See, e.g., Manchester Farming*, 315 F.3d at 1181 ("'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will."); The Nw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 n.6 (3d Cir. 2005) (To recover from an insurer for failure to pay a claim, a showing of "bad faith" "imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; *mere negligence or bad judgment is not bad faith*"). I recognize that the terms "good faith" and "bad faith" are sufficiently protean that they cannot be assigned a single clear meaning in all contexts, and their meaning might indeed be ambiguous even in a single context. *See, e.g.,* Black's Law Dictionary, *supra* note 43 (noting the elusive nature of the term "good faith"); GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT 1, 3 (Reger Brownsword ed., 1999) ("Good faith is an elusive idea, taking on different meanings as we move from one context to another. . . ."). Nor do I claim here to have

2. The Court's Inability to Let Go of Language Smacking of the Moral Culpability Associated with Subjective Mental States

The *Leon* Court's commitment to a purely objective notion of good faith was, however, also a weak one, for the opinion is replete with references to subjective mental states.[47] Thus, the Court praised the deterrent purpose of the exclusionary rule as one that "necessarily assumes that the police have engaged in *willful,*" or at least negligent, misconduct.[48] Likewise, the Court noted that it has never questioned the need for the exclusionary rule where "a Fourth Amendment violation has been substantial *and deliberate*."[49] Furthermore, the Court gave as one of its four primary examples of conduct that would *not* constitute good faith an affiant's *knowingly* making false statements to obtain a search warrant or doing so in reckless disregard of the truth, situations unquestionably requiring inquiry into the affiant's state of mind.[50] The Court also considered it relevant to consider "whether the warrant application had previously been rejected by another magistrate," an inquiry that arguably explores an individual officer's ill intentions in judge-shopping.[51] Similarly, in a footnote, the Court cautioned that its approach was not meant to, and should not, "encourage officers to pay less attention to what they are taught [about Fourth Amendment doctrine], as the requirement that the officer act in 'good faith' is inconsistent with *closing one's mind* to the possibility of illegality."[52] Language of "mind" rather than "reason-giving" smacks of inquiry into an officer's actual

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offered anything approaching a comprehensive listing and analysis of the terms' meanings in every area of the law in which it arises. Nevertheless, the various examples used here should be sufficient to support the idea that in law and in everyday usage bad faith connotes more than simple tort negligence, requiring either some significantly more culpable failure of obligation to another, some consciousness of wrongdoing or both.

[47] *See* United States v. Leon, 468 U.S. 897, 919, 907-08, 923-24 (1984).

[48] *Id.* at 919.

[49] *Id.* at 907-08.

[50] *Id.* at 923-24.

[51] *Id.* at 922 n.23.

[52] *Id.* at 919 n.20.

processes of thought. At a minimum, language sounding in subjective mental states suggests a concern with a level of moral culpability akin to, if not necessarily identical to, those states.

3. The Illogic of "Unreasonable Unreasonableness"

Even if we accept at face value the Court's assertion that its test is a purely objective one, however, its notion of unreasonable behavior still goes well beyond ordinary tort negligence. Justice Stevens recognized this in his dissent.[53] Stevens noted that, under *Illinois v. Gates*,[54] probable cause is itself a practical, common-sense decision whether there is but a fair probability of uncovering contraband or evidence of crime in a particular place. Additionally, a magistrate's determination of probable cause is entitled to "substantial deference."[55] Yet, in *Leon* itself, the Court conceded that there was no probable cause for the search. The magistrate had, therefore, by definition already acted so unreasonably that his probable cause determination was no longer entitled to substantial deference, Stevens maintained. But, explained Stevens, under the *Leon* majority's good faith rule such gross magistrate negligence, unquestionably violative of the Fourth Amendment's command that all searches be "reasonable," would still be insufficient to justify suppression. Suppression would follow only if this already extreme failure of the magistrate was so beyond the pale that no officer could miss it. Explained Stevens, "when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know they are violating the Constitution."[56] The Court's approach—which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful—can only lead to an increased number of constitutional violations. To require more, as does the majority, Stevens seems to be saying, is to require a sort of super-negligence by the police. But this sort of gross negligence—above and beyond simple tort negligence—is precisely what the vast majority of jurisdictions require as the minimum for imposing criminal, rather than civil, liability.[57] It is a form of negligence revealing a character indifferent to the harm one's conduct imposes on others.[58] For Stevens, this requirement of super-negligence was also inconsistent with the Framers' intentions. Thus, Stevens continued,

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[53] 468 U.S. at 960 (Stevens, J., dissenting).

[54] Illinois v. Gates, 462 U.S. 213, 238 (1983).

[55] *Id.* at 236.

[56] *Leon*, 468 U.S. at 975.

> In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.[59]

The issuance of unparticularized warrants unsupported by adequate individualized suspicion was thus, for Stevens, the very core of the Framers' definition of an "unreasonable" search or seizure. To require more than this base level of unreasonableness is to render reliance on flawed warrants nearly "automatically appropriate," a position that the Framers, in Stevens' view, "would have vehemently rejected."[60]

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[57] *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (defining criminal negligence as involving a "*gross* deviation from the standard of care that a reasonable person would observe in the actor's situation") (emphasis added).

[58] *See* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception,* 28 HARV. J. LAW & GENDER 381 (2005) [hereinafter Taslitz, *Willfully Blinded*] (analyzing criminal negligence in date rape).

[59] *Leon*, 468 U.S. at 972 (Stevens, J., dissenting).

[60] *Id.* at 970-71. For a summary of the relevant history of the Fourth Amendment supportive of Stevens' vision that guaranteeing government action only upon individualized suspicion was a core purpose of the Amendment, see TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8.

Justice Brennan, joined by Justice Marshall, dissented separately,[61] but relying largely on the very different grounds to which I now turn, namely, whether the exclusionary rule aims at affecting the individual officer, the police as an entity, the judiciary, some combination of these possibilities, or society as a whole.

C. Institutional Obligations

1. Suppression Aims at the Police as an Entity

The Court majority saw the exclusionary rule and the good faith exception as operating at the level of the police as an institution rather than at the level of the individual officer. On the other hand, insisted the Court, it is only the police as an institution and not other, sometimes broader, institutions or entities, such as the judiciary or society as a whole, with which good faith is concerned.[62] Moral culpability thus generally, though not exclusively, means the moral culpability of the police *department* rather than of the beat officer, his commander, or a supervising judge.

Thus the Court declared that it rejected "the subjective good faith of individual officers" in place of objective reasonableness because only the latter "retains the value of the exclusionary rule as an incentive for the *law enforcement profession as a whole*" to act in accord with the Fourth Amendment.[63] The objective standard, the Court continued, "requires officers to have reasonable knowledge of what the law prohibits."[64] The Court therefore praised Professor Jerold Israel's observation that the major value of the exclusionary rule as a deterrent is "'the impetus it has provided to police training programs that make officers aware of the limits imposed by the Fourth Amendment and emphasize the need to operate within these limits.'"[65] An objective good faith exception preventing exclusion of evidence in "borderline cases," concluded the Court, will not undermine such Fourth Amendment educational programs, "which are now viewed as an important aspect of police professionalism," nor will it alter their tenor or encourage instructors to pay less attention to Fourth Amendment dictates.[66] To the contrary, suggested the Court, encouraging high quality, effective educational programs designed by police departments to reach each and every officer may be a *sine qua non* of objectively reasonable behavior. Indeed, noted the Court, only the "reasonably well-trained officer"—presumably as defined by the high quality of these paradigm educational programs—can be the standard for whether action is done in good faith.[67]

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[61] *See Leon*, 468 U.S. at 928 (Brennan, J., dissenting).

[62] *See infra* text accompanying notes 63-80.

[63] *Leon*, 468 U.S. at 915 n.13, 918-19 (majority opinion) (emphasis added).

[64] *Id.* at 919 n.20.

[65] *Id.* at 919 n.20 (quoting Jerold Israel, *Criminal Procedure, the Burger*

Elsewhere in its opinion the Court analogously emphasized the *collective knowledge* of the police rather than of individual officers. Explained the Court:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.[68]

Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1319, 1412-13 (1977)). The empirical data shows that, since *Leon,* Professor Israel's observation has continued to be borne out. *See, e.g.,* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990 (1993).

[66] *Leon*, 468 U.S. at 919 n.20.

[67] *See id.* at 919 n.20.

[68] *Id.* at 923 n.24. A number of well-known scholars have similarly emphasized the idea of entity liability for the police as central to giving the Fourth Amendment meaning. Professor Amar thus declares:

> Strict entity liability in the twentieth century makes perfect sense as the substitute for—indeed, the exact equivalent of—strict officer liability in the eighteenth century. The intervening years have brought us vastly increased bureaucratic density. The Framers' constables have be-

Importantly, however, the Court went to great pains to emphasize that it views the police as the *only* relevant institution, and the one whose ill conduct the exclusionary rule is designed to deter. Getting a warrant is presumptively the most that can be expected of a law-abiding officer, that act itself demonstrating compliance with the law. "Penalizing the officer," explained the Court, for the magistrate's error rather than his own "cannot logically contribute to the deterrence of Fourth Amendment violations."[69] Magistrates can be trusted to do their job and, where they breach that trust, there are administrative remedies internal to the operation of the judiciary and professional incentives to improve future magisterial conduct.[70] Recourse for his misdeed lies elsewhere than the exclusionary rule.[71]

2. The Dissenters

a. Brennan: The Exclusionary Rule Aims Jointly at the Institutions of the Police and the Judiciary

The dissenting Justices agreed that the constitutional rules governing suppression of evidence must ultimately aim at institutional more than individual behavior. However, the dissenters disagreed among themselves and with the majority over what institutions were of concern. Justice Brennan, joined by Justice Marshall, saw the very purpose of searches and seizures as being to obtain evidence admissible against a defen-

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> come our police *departments*; their watchmen, our environmental protection *agencies*; and so on. The true locus of decisionmaking authority has shifted from the individual to the organization. The deterrence concept implicit in both the text and history of the amendment calls for placing (initial) liability at the level best suited to restricting government conduct to avoid future violations. For the Framers, that level was the constable; for us, the police department.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 41.

[69] *Leon*, 468 U.S. at 921.

[70] *See id.* at 917 n.18.

[71] *Id.*

dant at a criminal trial.[72] Officers obtaining and judges admitting evidence thus work in tandem. Beyond this, the Fourth Amendment by its very terms, like all provisions of the Bill of Rights, "restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected."[73] Justice Brennan therefore rejected the majority's distinction of the evidence-gathering function of the police from the evidence-admitting function of the judiciary. No such separation, argued Brennan, is justified by either the language or history of the Amendment. "It is difficult," Brennan argued, "to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements."[74] Accordingly, "by admitting unlawfully seized evidence, the judiciary becomes part of what is in fact a single governmental action."[75]

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[72] *Leon*, 468 U.S. at 932-34 (Brennan, J., dissenting).

[73] *Id.* at 932.

[74] *Id.* at 933-34

[75] *Id.* at 933. Yet, Brennan also stressed, even within the police department, the question of incentives must be judged at the entity, not the individual, level:

> If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, *police departments* will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

Id. at 955 (emphasis added).

b. Stevens: The Exclusionary Rule Aims at All of Society

Justice Stevens' dissent went still further, seeing the exclusionary rule as even more broadly impacting all of political society. Stevens thought the exclusionary rule preferable to civil liability against an individual officer, both because the latter would create excessive deterrence and because "it avoids the obvious unfairness of subjecting the dedicated officer to the risk of monetary liability for a misstep while endeavoring to enforce the law."[76] To avoid such unfairness, maintained Stevens, it is "[s]ociety, rather than the individual officer," who "should accept the responsibility for inadequate training or supervision of officers engaged in hazardous police work."[77]

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[76] *Leon*, 468 U.S. at 974 n.28 (Stevens, J., dissenting). Akhil Amar, no fan of the exclusionary rule, would add, however, that the current civil liability regime falls woefully short of the mark:

> In our century, however, judges for the first time have created wide zones of individual officer immunity for constitutional torts. Within these zones, the innocent citizen victim is in effect held liable and left to pay for the government's constitutional wrong. The Framers would have found the current remedial regime, in which a victim of constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles, trumpeted in *Marbury v. Madison*, that for every right there must be a remedy.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40-41.

[77] *Leon*, 468 U.S. at 974 n.28. Again, in Amar's reading of history, this was also indeed analogous to the understanding of the Framers, who, he notes, additionally would have rejected at least any sort of subjective good faith defense to a damages award:

> Eighteenth-century common law allowed suit against the officers personally, but everyone understood that the real party in interest was the government itself, which would typically be forced to indemnify officials who were merely carrying out government policy. (Without indemnification, who would agree to work for the government?) Thus, we have already seen the Maryland Farmer speaking of damage awards deriving from "the public purse"—no doubt a reference to the notorious fact that the English government had indemnified all the officials in the Wilkes affair, to the tune, it appears, of £100,000. . . . Precisely because officials would be indemnified, it was not unfair to hold them strictly liable for constitutional torts, even if they acted in the good faith (but incorrect) belief that their behavior was fully constitutional. Recall, for example, the Maryland Farmer's insistence on "ruinous damages whenever an officer had deviated from the rigid letter of the law"—and recall further

But, Stevens further argued, there are more important reasons for society's paying the price for police errors than simply avoiding unfairness to the individual officer. Democratic theory and the political-moral principles defining America as a single nation required society-wide acceptance of blame for an officer's unconstitutional misbehavior.[78] Quoting Justice Burger's statement of two decades earlier at length, as I think is merited here as well, Justice Stevens elaborated on the relevance of democratic theory. Said Stevens, through embrace of the words of Chief Justice Burger:

"It is the proud claim of a democratic society that the people

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> that heavy damages were assessed in the Wilkes affair, even though the officials there had followed an executive practice stretching back seventy years.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40. Amar's contentions that liability was strict and that there were few serious obstacles to damage awards for valid claims have been vigorously contested. *See* Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. REV. 925 (1997); Tracey Maclin, *The Central Meaning of the Fourth Amendment,* 35 WM. & MARY L. REV. 197 (1993). Neither challenge takes away from his point that it was ultimately the government, rather than the individual officer, who was understood to be responsible for damages for constitutional violations. Governmental *liability* is not necessarily the same as *societal responsibility* — the latter being Stevens' emphasis — except to the extent that the government is viewed as one important practical representative of society, which it would be in a damages action (there is no other practical way to make "society" pay a damages award). Outside the context of monetary damages or equitable relief, and in the context of the theory underlying the Fourth Amendment, however, Stevens' broader emphasis on "society" over the "government" may make sense if "society" and "the People" are equated. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8, at 55-61 (arguing that both the beneficiaries of, and the ultimate responsible enforcers of, the Fourth Amendment, as well as those fundamentally bearing its burdens and enjoying its benefits, are "the People"). As for Amar, he either sees the government as a whole or the People as the responsible parties—which is a bit unclear—but seems to side against the *Leon* majority's view that it is only *police liability* that matters (as distinct from other governmental entities), at least in the exclusionary rule context. *Compare* AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40-41 (primarily emphasizing *governmental* responsibility—though seemingly willing to make the offending sub-entity, whether the police or the EPA, pay damage awards) *with* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 64-77 (1998) (primarily emphasizing the central role of "the People" under much of the Bill of Rights generally and the Fourth Amendment specifically).

[78] *See Leon*, 468 U.S. at 974 n.28.

> are masters and all officials of the state are servants of the people. That being so, the ancient rule of respondeat superior furnishes us with a simple, direct and reasonable basis for refusing to admit evidence secured in violation of constitutional or statutory provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible and society is 'penalized' by refusing it the benefit of evidence secured by the illegal action. This satisfies me more than the other explanations because it seems to me that society—in a country like ours—is involved in and is responsible for what is done in its name and by its agents. Unlike the Germans of the 1930's and early '40's, we cannot say 'it is all The Leader's doing. I am not responsible.' In a representative democracy we are responsible whether we like it or not. And so each of us is involved and each is in this sense responsible when a police officer breaks rules of law established for our common protection."[79]

Although Stevens lost his argument against the good faith exception to the exclusionary rule, his calls for democratic vicarious responsibility for others' wrongful acts has much in common with the majority's reasoning. The differences among Stevens, his fellow dissenter Justice Brennan, and the majority are over what social institutions are to fall within the exclusionary rule's embrace. But all three approaches emphasize concepts of primarily *institutional* fidelity, moral responsibility, and vicarious liability. The commitment to an institutional level of thinking is not monolithic, as exemplified by the majority's definition of *intentionally* false affiant statements made to obtain a warrant as necessarily done in bad faith.[80]

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[79] *Id.*

[80] *See supra* text accompanying notes 30-31. Justice Blackmun, it is worth briefly mentioning, joined the majority but also wrote a separate concurrence to issue this caution:

> What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law en-

Nevertheless, the primary focus is an institutional one.

D. *Simultaneous and Post-*Leon *Developments*

My major concern here is with the conceptual model implicit in *Leon* itself. Nevertheless, most of the few simultaneous and post-*Leon* cases decided by the Court lend further precential support for this model, with one cryptic potential exception unlikely to have much countervailing impact on future cases.

1. *Massachusetts v. Sheppard*

Massachusetts v. Sheppard[81] was decided the same day as *Leon*. There, a police detective drafted an affidavit in support of an application for an arrest warrant and a warrant to search Osborne Sheppard's home for specifically-described items, including a homicide victim's clothing and a blunt instrument that might have been used in the killing. Because it was a Sunday (the courts were closed), police were only able to find a warrant form for controlled substances. The affiant explained to the judge at his home that the warrant might need changes. The judge found probable cause and told the detective that the necessary changes in the warrant form would be made. But the judge never altered the form to authorize seizure of anything other than controlled substances nor to incorporate the affidavit. The judge returned the warrant and affidavit to the detec-

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> forcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

Leon, 468 U.S. at 928 (Blackmun, J., concurring). Blackmun is obviously not accepting Stevens' notion of society-wide responsibility for Fourth Amendment violations. But, though admittedly somewhat ambiguous, Blackmun's repeated emphasis seems to be on the future impact of the good faith exception on law enforcement *as a whole*, that is, as a distinct entity separate from the individual officers comprising it and from other parts of the government.

[81] 468 U.S. 981 (1984).

tive, informing him that the warrant was sufficient in form and content to authorize the search requested. The ensuing search was limited to the items listed in the affidavit, and the resulting discovery of incriminating evidence led to Sheppard's conviction of first-degree murder.

After a circuitous history leading to denial of Sheppard's suppression motion at the trial level but reversal of that ruling at the state appellate level, the case reached the United States Supreme Court limited to the question whether the officer's undisputed but mistaken belief that the warrant contained a valid, particular description, of the items to be seized was reasonable. The Court held that it was.

"The officers in this case took every step that could reasonably be expected of them,"[82] the Court concluded. Although the warrant itself was ultimately facially defective, said the Court, that was because the detective had relied upon the judge's assurance that "everything is all right."[83] "[W]e refuse," the Court explained, "to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."[84] Although a warrant-executing officer who was not involved in the application process might have to read the warrant, an issue the Court did not then need to decide, the detective in *Leon* was involved in that process in a way that gave him good reason to believe that the warrant he had obtained granted the authority he had sought.

The warrant-issuing judge may, of course, have acted unreasonably, but the Court sharply compartmentalized the judiciary and the police, refusing to hold the latter liable for the former's wrongs. Explained the Court:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police

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[82] *Id.* at 989.
[83] *Id.* at 990.
[84] *Id.* at 989-90.

> officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve.[85]

2. *Arizona v. Evans*

a. *The Majority Opinion*

The Court similarly stressed the compartmentalization of the police from the judiciary in *Arizona v. Evans*.[86] When an

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[85] *Id.* at 990-91 (alteration in original) (quoting in part Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring)).

[86] 514 U.S. 1 (1995). Eight years before deciding *Evans*, the Court had also decided *Illinois v. Krull*, 480 U.S. 340 (1987). I do not address *Krull* in detail here, for it does less than the other cases that I discuss to illuminate the two issues of concern to me here: moral culpability and entity liability. Nevertheless, a brief summary of *Krull* may be worthwhile.

In *Krull*, the Court extended the good faith exception from reasonable reliance on an unconstitutional warrant to reasonable reliance on an unconstitutional statute. In doing so, the Court tracked *Leon*'s reasoning closely. Explained the Court, "legislators, like judicial officers, are not the focus of the [exclusionary] rule." *Id.* at 350 (alteration in original). Accordingly, paraphrasing *Leon*, the Court declared: "'Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.'" *Id.* at 350 (alteration in original) (quoting *Leon*, 468 U.S. at 921). The Court saw no reason to deter legislators, who would not be inclined to subvert their oaths to uphold the Constitution, are not part of the law enforcement team, deliberate in a less-harried fashion than the police, and are already adequately deterred by the fear of judicial review. However, explained the Court, an officer cannot reasonably rely on a statute passed under circumstances demonstrating that the "legislature wholly abandoned its responsibility to enact constitutional laws," *id.* at 355, nor on statutory provisions "that a reasonable officer should have known . . . [were] unconstitutional." *Id.* at 355 (alteration in original). Once again, the Court emphasized, "the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers." *Id.* at 355.

Justice O'Connor, joined by Justices Brennan, Marshall, and Stevens, dissented, primarily on historical grounds:

> Unlike the Court, I see a powerful historical basis for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute. Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. This Court has re-

officer stopping Isaac Evans for driving the wrong way on a one-way street checked Evans' computer records, they mistakenly indicated that he was wanted on an arrest warrant. Unbeknownst to the officer, that warrant had previously been quashed. The procedure usually followed in Phoenix, Arizona, where these events took place, was that a justice court clerk would inform the warrant section of the Sheriff's Office when a judge had ordered a warrant quashed. The clerk would note in a file that the phone call to the Sheriff's office had been made, and the Office would then remove the warrant from its computer records. In Evan's case, however, no court clerk had apparently ever made that call. The officer stopping Evans thus believed that the arrest warrant was still valid, accordingly arresting Evans. While being handcuffed, Evans dropped a marijuana cigarette, prompting a search of his car and the discovery of a bag of marijuana under the passenger's seat. The trial judge's grant of Evan's motion to suppress, after his arrest for possession of marijuana, eventually brought the case before the United States Supreme Court, which found suppression to be in error under the Fourth Amendment. Once again, as in *Sheppard,* the Court saw the error as the judiciary's, not the police department's, and the latter could not be charged with the former's errors, nor could the judiciary's errors be the basis for an exclusionary remedy:

> If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon, the exclusionary rule was*

> peatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance was the moving force behind the Fourth Amendment.

Id. at 362 (O'Connor, J., dissenting) (citations omitted). O'Connor also argued that experience and precedent showed that the legislature could not always be trusted, lacked a tradition like that of judicial independence, and lacked the particularized, fact-specific, non-political decisionmaking structure of the judiciary, there thus being still more reason to trust judges rather than legislators. At least concerning the historical analysis, Justice O'Connor likely had the better of the argument. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8.

> *historically designed as a means of deterring police misconduct, not mistakes by court employees.* Secondly, respondent [Evans] offers no evidence that court employees are inclined to ignore or subvert the Fourth amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Finally, and most important, there is no basis for believing the application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.[87]

b. Justice O'Connor's Concurrence

Justice O'Connor wrote a concurring opinion, joined by Justices Souter and Breyer.[88] O'Connor emphasized that she saw the Court's opinion as limited to the narrow question whether the sort of error by a court employee now before the Court was one to which the exclusionary rule should apply. But O'Connor wondered whether there may have been another error, not considered by the Court, an error still focusing on unreasonable action by the police as an entity but concerning the relationship of the police to the judicial branch:

> [T]he Court does not hold that the court employee's mistake in this case was necessarily the *only* error that may have occurred and to which the exclusionary rule might apply. While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself.* Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping

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[87] *Evans*, 514 U.S. at 14 (citations omitted).

[88] *Id.* at 17 (O'Connor, J., concurring).

> system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).
>
> This is saying nothing new. We have said the same with respect to other information sources police use, informants being an obvious example. . . . Certainly the reliability of recordkeeping systems deserves no *less* scrutiny than that of informants.[89]

c. *Justice Souter's Concurrence*

In a separate brief concurring opinion, Justice Souter, joined by Justice Breyer, while not generally questioning the wisdom of separating the police from other governmental entities for exclusionary rule purposes, did raise doubts about continued application of that separation in the context of computer error:

> To [Justice O'Connor's] concurrence, which I join as well, I add only that we do not answer another question that may reach us in due course, that is, how far, in dealing with fruits of computerized error, our very concept of deterrence by exclusion of evidence should extend to the government as a whole, not merely the police, on the ground that there would otherwise be no reasonable expectation of keeping the number of resulting false arrests within an acceptable minimum limit.[90]

That question has not, however, yet reached the Court in "due course," and Souter has not since *Evans* given any indication of pushing for a breach in the liability wall between the police and other governmental actors.

d. *Justice Stevens' Dissent*

Justice Stevens, in dissent, rejected the wall notion entirely.[91] For Stevens, the Fourth Amendment protects the right of the police to be secure "against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely some of its agents."[92] Accordingly, "[t]he remedy for its violation imposes costs on that sovereign motivating it to train all of its personnel to avoid future violations."[93] Even accepting the inadvisable wall, however, concluded Stevens, the police needed deterring, for they do not and cannot operate in splendid isolation from other governmental actors. Police cannot simply trust the rest of government to act rightly. The police are obligated to investigate the competence of their sister state entities. In this case, said Stevens,

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[89] *Id.*

[90] *Id.* at 18 (Souter, J., concurring) (alteration in original).

[91] *Id.* (Stevens, J., dissenting).

> The Phoenix Police Department was part of the chain of information that resulted in respondent's unlawful, warrantless arrest. We should reasonably presume that law enforcement officials, who stand in the best position to monitor such errors as occurred here, can influence mundane communication procedures in order to prevent those errors. That presumption comports with the notion that the exclusionary rule exists to deter future police misconduct *systemically.* The deterrent purpose extends to law enforcement as a whole, not merely to "the arresting officer."[94]

Stevens further complained that the innocent citizen would suffer the indignity of arrest, handcuffing, and public search "simply because some bureaucrat has failed to maintain an accurate computer data base."[95] Stevens further agreed that *Leon* did not even apply, for the officer believed he acted pursuant to what was in reality *a non-existent warrant. Leon*'s logic does not apply to such warrantless arrests.

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[92] *Id.*

[93] *Id.*

[94] *Id.* at 19-20 (emphasis added) (citation omitted).

[95] *Id.* at 21.

e. Justice Ginsburg's Dissent

Justice Ginsburg also authored a dissenting opinion, joined by Justice Stevens. Ginsburg would have dismissed the writ of certiorari on the grounds that the Court had incorrectly presumed that Arizona had rested its decision on federal grounds. Without greater clarity, concluded Ginsburg, the obligation affirmatively to demonstrate the Court's jurisdiction had not been satisfied. Ginsburg was particularly concerned about the Court's too easily finding jurisdiction because, she believed, computerization raised complex questions better initially reserved to the states, acting as "laboratories for testing solutions to novel legal problems."[96]

Although the main thrust of Ginsburg's opinion was that the writ should have been dismissed and that computers pose unique dangers to constitutional rights, along the way she too challenged the wisdom of the wall between the police and the rest of the government, at least where computers are involved:

> In this electronic age, particularly with respect to recordkeeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer data base can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, *e.g.*, a court employer, or another, *e.g.*, a police officer, caused the error to exist or to persist. Applying an exclusionary rule as the Arizona court did may well supply a powerful incentive to the State to promote the prompt updating of computer records. . . .The incentive to update promptly would be diminished if court-initiated records were exempt from the rule's sway.[97]

Ginsburg also cited with approval one party's argument that exclusion would encourage "'policymakers and systems managers'" to monitor their systems and personnel, and further approved the trial court's statement that "the mistake in Evans case was 'perhaps the negligence of the Justice Court, or the negligence of the Sherriff's office. But it is still the *negligence of the State.*'"[98] This last point, though ambiguous, might extend beyond the computer-reliance situation, suggesting the complete collapse of the police wall in all exclusionary rule analysis. In sum, *none* of the various opinions challenged the moral culpability precepts of *Leon* or its emphasis on entity liability. Indeed, the opinions generally supported these precepts. The only major dispute (except for Stevens' hint that the entire good faith exception should fall because it is based on flawed premises) was whether to treat the relevant entity as the police or the government as a whole (or at least some parts of the government other than the police). Stevens would have collapsed the wall entirely, while Ginsburg and Souter seemed willing to do so at least in the instance of computer-informed searches and seizures, and perhaps less clearly, in all cases whatsoever. Yet these three Justices have not thus far either had the opportunity, or been able, to build a majority for smashing the wall or even punching little holes in it. The *Leon* rule—subject to reservations arising from a recent case that I will next address—remains supported by the tripod of: (1) distinct (2) police entity liability (3) turning on breach of fundamental principles of political morality.

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[96] *Id.* at 23 (Ginsburg, J., dissenting).

[97] *Id.* at 29.

3. *Groh v. Ramirez*

a. Groh*'s Holding*

Groh v. Ramirez[99] is the potential outlier. I address all the major issues in *Groh* here for several reasons. First, the initial impression left by *Groh* is that it is inconsistent with *Leon*'s model of good faith. I want to counter that impression while also considering the implications of its nevertheless turning out to be correct. Second, the various opinions in *Groh* do not clearly parse out the remedial question from the substantive one. The two questions are indeed intertwined. In some sense this must always be so, for the more egregious the substantive violation, the less likely that it was made in good faith. Indeed, for violations of the particularity requirement—the substantive question involved in *Groh*—the *Leon* court had expressly declared the availability of the good faith exception to be contingent on the severity of the substantive mistake.[100] Relatedly, if there is reason to believe that the substantive violation found in *Groh* would not today be recognized by the new Roberts' Court, then the remedial portion of the opinion might also carry less current precedential weight. Finally, the interchanges among the majority and dissenting Justices in *Groh* concerning both the substantive and remedial issues clarify in particular the meaning of the "mental state" requirement inherent in the good faith test.

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[98] *Id.* at 29 n.5 (quoting App. 51).

[99] 540 U.S. 551 (2004).

Groh involved a magistrate who signed a warrant form based upon an application particularly describing the items to be seized: "any automatic firearms or parts of automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."[101] The application was supported by a detailed affidavit establishing probable cause, cause based upon the personal observations made by a concerned citizen. The unregistered possession of these items constituted a crime.

Unfortunately, the warrant itself contained no description whatsoever of the items to be seized, which had been so carefully catalogued in the application. Nor did the warrant incorporate the application by reference. Instead, it merely described the property to be searched—the ranch residence of Joseph Ramirez—repetitively and mistakenly listing that same location as the *items* to be seized.

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[100] *See supra* text accompanying notes 30-31.

[101] *Groh*, 540 U.S. at 554.

Jeff Groh, a Special Agent for the Bureau of Alcohol, Tobacco, and Firearms, led a team of officers in conducting the search the next day. Groh maintained that he orally described the objects of the search to Mrs. Ramirez in person and later to Mr. Ramirez by telephone. Mrs. Ramirez insisted, however, that she was told only that Groh was searching for "'an explosive device in a box.'"[102] But the officers did not find any illegal weapons or explosives. When they left, they for the first time gave Mrs. Ramirez a copy of the warrant but not of the sealed application. The next day, upon the request of the Ramirez's counsel, Groh faxed that attorney a copy of the page of the application listing the items to be seized.

The Ramirezes' subsequent civil suit against the agents included a Fourth Amendment claim, but the district court granted summary judgment in favor of all the defendants on all claims. The Court of Appeals, by contrast, found a Fourth Amendment violation because of the absence of a particular description in the warrant but also found that all the executing officers other than Groh were protected by qualified immunity. Under *Leon*,[103] according to the appellate court, Groh, as the search team leader, lost immunity for failing to read the warrant and satisfy himself that it was not defective. The court added that a search team leader is obligated to ensure that an accurate and complete copy of the warrant is available to be given to the person whose property is being searched *at the search's commencement*.

(i) The Substantive Fourth Amendment Unreasonableness Claim

The United States Supreme Court affirmed the judgment of the Court of Appeals. The Court concluded that the warrant was "plainly invalid"[104] because of its violation of the Fourth Amendment's particularity requirement as to the things to be seized. The accurate description in the application did not cure the defect because the application was not incorporated into the warrant by reference. There was indeed no description at all in the warrant of what was to be seized, rendering the search effectively warrantless, thus presumptively unreasonable.

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[102] *Id.* at 555 (citation omitted).

[103] United States v. Leon, 468 U.S. 897 (1984).

[104] *Groh*, 540 U.S. at 557.

The Court was thus unpersuaded that Groh's oral description, combined with the magistrate's finding of probable cause and the actual limitation of the search to the items listed in the application, "was functionally equivalent to a search authorized by a valid warrant."[105] The Court also rejected the argument that the presumption of unreasonableness should not apply where, as here, the goals of the particularity requirement, such as preventing general searches, the seizure of items not authorized, or the issuance of warrants based on dubious information, have been served by other means: "[U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."[106]

The Court distinguished this case from that of the magistrate in *Sheppard*,[107] who had specifically advised the officers that he would and had corrected any constitutional defects in the warrant. Because no such magistrate assurances were present in *Groh*, concluded the Court, the error was fairly described as chargeable to the police rather than only to the magistrate. Yet, the *Groh* Court added: "Nor would it have been reasonable for petitioner [Groh] to rely on a warrant that was so patently defective, *even if the Magistrate was aware of the deficiency.*"[108]

Furthermore, the Court maintained, the particularly requirement does more than prevent general searches. It also "'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search,'"[109] thus "'greatly reduc[ing] the perception of unlawful or intrusive police conduct.'"[110]

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[105] *Id.* at 558.

[106] *Id.* at 560.

[107] Massachusetts v. Sheppard, 468 U.S. 981 (1984).

[108] *Groh*, 540 U.S. at 561 n.4.

Cryptically, however, after making these unequivocal declarations, the Court stated in a footnote that whether it would be reasonable to refuse a request to furnish a warrant at the outset of a search when, as here, the occupant of the premises was present and posed no threat to the officers "is a question that this case does not present."[111] This statement was itself preceded in that same footnote by the assertion that "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing office to serve the warrant on the owner before commencing the search."[112] Yet, in a later footnote, the Court once again asserted that the "Fourth Amendment's particularity requirement assures the subject of the search that a magistrate has duly authorized the officer to conduct a search of limited scope[,]"[113] a substantive right breached when the officer fails even to glance at the warrant to detect a glaring defect.

As for Groh's assertion that his oral description gave sufficient notice to all relevant persons adequate to serve the goal of enhancing the perceived legitimacy of the search, the Court simply noted that Mrs. Ramirez disagreed, asserting that she was told only that Groh sought "'an explosive device in a box," a description, the Court concluded, that was "little better than no guidance at all."[114] Because the matter came before the Court in the context of a motion for summary judgment, Mrs. Groh's version of the facts, as that of the nonmovant, must, said the Court, be accepted as true and all inferences from it drawn in her favor.

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[109] *Id.* at 561 (quoting United States v. Chadwick, 433 U.S. 1 (1977), *abrogated on other grounds*, California v. Acevedo, 500 U.S. 565 (1991)).

[110] *Id.* at 561-62 (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983)).

[111] *Id.* at 562 n.5.

[112] *Id.*

[113] *Id.* at 565 n.9.

[114] *Id.* at 562-63.

(ii) Qualified Immunity

On the question whether, despite the constitutional violation of the particularity requirement, Groh was entitled to qualified immunity, the Court purported to apply the same test as in criminal cases: *Leon*'s good faith exception to the exclusionary rule.[115] According to the Court, the particularity requirement is set forth in express, clearly established constitutional language that any reasonably competent public official can understand. Furthermore, said the Court, because Groh himself prepared the flawed warrant, he could not claim that he reasonably relied on the magistrate's assurances, contrary to the situation in *Sheppard.*[116] Even more importantly, the Court explained:

> In fact, the guidelines of petitioner's own department placed him on notice that he might be liable for executing a manifestly invalid warrant. An ATF directive in force at the time of this search warned: "Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate." *See also* . . . [§] 3220.1(23)(b) ("If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be postponed until a satisfactory warrant has been obtained.")[117]

Although the Court recognized that not every violation of an internal guideline vitiated qualified immunity, the Court "refer[red] to the ATF Order only to underscore that petitioner should have known that he should not execute a patently defective warrant."[118]

Finally, and once again cryptically, the Court addressed the "mens rea" requirement for qualified immunity, and thus for the good faith exception:

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[115] *Compare* United States v. Leon, 468 U.S. 897 (1984) (articulating good faith exception) *with* Malley v. Briggs, 475 U.S. 335 (1986) (reciting the qualified immunity standard).

[116] Massachusetts v. Sheppard, 468 U.S. 981 (1984).

[117] *Groh*, 540 U.S. at 564.

[118] *Id.* at 564 n.7.

> Petitioner contends that the search in this case was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity. See *Malley v. Briggs,* 475 U.S. 335, 341 . . . (1986). But as we observed in the companion case to *Sheppard,* "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon,* 468 U.S. at 923 . . . . This is such a case.[119]

b. Simple or Super-Negligence?

This last passage is one reason that I have described *Groh* as an outlier. The Court never expressly explained *why* "[t]his is such a case," that is, a case failing *Leon*'s good faith test. One way to read the quoted language is that the Court was agreeing that more than simple negligence is required; the Court's citation of *Malley v. Briggs,*[120] which expressly took this position, supports this reading. If that is so, the Court necessarily concluded that Groh engaged in grossly negligent conduct. Yet Groh's efforts included solid investigation and careful drafting of the warrant application and supporting affidavit, with the error involved being one of mere "proofreading," however much the Court might have preferred alternative terminology.[121] This hardly seems like extreme negligence.

An alternative way to read the Court's language is that the Court in fact rejected Groh's position that loss of good faith or of qualified immunity required more than simple negligence. Under this view, ordinary tort negligence, or perhaps even less, would suffice to overcome a claim of good faith. That would surely be a departure from the *Leon* test as the Court originally articulated it. Justice Kennedy, with whom then-Chief Justice Rehnquist joined, in fact feared that that was precisely what the Court had done:

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[119] *Id.* at 565.

[120] 475 U.S. 335 (1986).

[121] *See* Groh v. Ramirez, 540 U.S. at 563 n.6 (insisting that the Court had not created a mere duty to "proofread" but rather "a duty to ensure that the warrant conforms to constitutional requirements").

> Our Court has stressed that "the purpose of encouraging recourse to the warrant procedure" can be served best by rejecting overly technical standards when courts review warrants . . . . We have also stressed that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341 . . . . The Court's opinion is inconsistent with these principles. Its analysis requires our Nation's police officers to concentrate more on the correctness of paper forms than substantive rights. The Court's new "duty to ensure that the warrant conforms to constitutional requirements" sounds laudable, . . . but would be more at home in a regime of strict liability than within the "ample room for mistaken judgments" that our qualified immunity jurisprudence traditionally provides.[122]

Justice Thomas, in his own dissent (joined in full by Justice Scalia and in part by Chief Justice Rehnquist), seemed to agree with Justice Kennedy that *Leon* required more than simple negligence but that the facts of *Groh* did not meet this threshold.[123] Yet, if it is correct that the majority opinion adopted a mere negligence or an even lower "strict liability" standard, then the good faith exception to the exclusionary rule (in the criminal context) and qualified immunity (in the civil context) de facto cease to exist. Remember that state conduct violates the Fourth Amendment only if that conduct is "unreasonable," a form of simple tort negligence.[124] If good faith evaporates whenever ordinary negligence is shown, then good faith evaporates entirely and forever in all cases because every

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[122] *Id.* at 566, 571 (Kennedy, J., dissenting).

[123] *Id.* at 571, 579 (Thomas, J., dissenting) ("Given the sheer number of warrants prepared and executed by officers each year, combined with the fact that these same officers also prepare detailed and sometimes somewhat comprehensive documents supporting the warrant applications, it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors.").

[124] *See supra* text accompanying notes 34-35.

Fourth Amendment violation involves such negligence, in effect occurring in "bad faith." That cannot be what the majority intended, for it never suggested that it was overruling *Leon*. Moreover, the new Roberts Court seems unlikely to accept such an interpretation of *Groh*, for that Court (or at least four of its members, with a fifth, Justice Kennedy, somewhat ambivalent on the point) is at least intent on narrowing, rather than expanding, the scope of the exclusionary rule.[125] Yet overturning *Leon* would have precisely the opposite effect.

c. *The Recent Weakening of* Groh*'s Underpinnings*

(i) The Significance of Notice

Moreover, whatever proposition *Groh* originally stood for, and though it is a precedent only a few years old, the conceptual underpinnings of the most anti-*Leon* or *Leon*-narrowing interpretation of *Groh* have recently been undermined. Despite the *Groh* Court's purported ambivalence on the point, its decision seemed to rest heavily on the presumption that the Ramirez's were entitled to prior notice of the limits on the officers' discretion by being presented with a copy of a particularized warrant.[126] Yet, just this past term, the Court in *United States v. Grubbs*[127] cited *Groh* unequivocally for the precisely opposite proposition:

> This argument [by the Ninth Circuit below] assumes that the executing officer must present the property owner with a copy of the warrant before conducting the search . . . . In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement. See *Groh v. Ramirez*, 540 U.S. 551, 562, n.5 (2004). "The

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[125] *See* Hudson v. Michigan, 126 S. Ct. 2159 (2006) (majority opinion rejecting application of the exclusionary rule to knock-and-announce violations and containing a blistering attack on any further expansion of the exclusionary rule); ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE SECOND EDITION 2006 SUPPLEMENT 116-24 (2006) (summarizing and analyzing the *Hudson* decision and the differences among the various Justices' positions).

[126] *See supra* text accompanying notes 109-13.

[127] United States v. Grubbs, 126 S. Ct. 1494 (2006). In *Grubbs*, the Court approved use of "anticipatory warrants." *See id.*

> absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that the requirement of particular description does not protect an interest in monitoring searches." United States v. Stefonek, 179 F.3d 1030, 1034 (CA 7 1999) (citations omitted). The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer . . . between the citizen and the police," . . . and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.[128]

(ii) Rejecting "Hyper-technicalism"

That leaves as the primary remaining basis for *Groh* the Court's conclusion that the warrant itself, not merely the affidavit and application, must be particularized to ensure that the magistrate in fact approved seizing all the items listed in these other documents. Yet, as Justice Thomas pointed out in his dissent in *Groh*, the "more reasonable inference is that the Magistrate intended to authorize everything in the warrant application, as he signed the application and did not make any written adjustments to the application or the warrant itself."[129] *Groh* was a 5-4 decision, with the majority consisting of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Justice O'Connor has since been replaced by Justice Alito, whose track record and jurisprudential philosophy make it far more likely that, facing similar issues in the future, he will reject the *Groh* majority's "hyper-technicalism" in favor of the four dissenting Justices' more flexible approaches.[130] One of the dissenters, then-Chief Justice Rehnquist, has been replaced by Chief Justice John Roberts, who purportedly has a judicial philosophy quite similar to Rehnquist's.[131] Two of the remaining dissenters, Justices Thomas and Scalia, have tended thus far to vote with Justice Alito and Chief Justice Roberts on criminal justice issues, particularly those involving the Fourth Amendment.[132] The remaining *Groh* dissenter, Justice Kennedy, seemed firm in his opposition to any dilution in *Leon*'s super-negligence standard.[133]

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[128] *Id.* at 1501.

[129] Groh v. Ramirez, 540 U.S. 551, 577 (2004) (Thomas, J., dissenting).

[130] *See, e.g.*, David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb 1, 2006, at A21.

[131] *See, e.g.*, Sheryl Gay Stolberg & Elizabeth Bumiller, *Senate Confirms Rob-*

(iii) Treating Good Faith and Qualified Immunity Differently

Furthermore, although all the Justices in *Groh* said that the *Leon* good faith exception to the exclusionary rule in criminal cases and the qualified immunity doctrine in civil cases involved identical standards,[134] there is reason to believe that the Court, if directly confronted with that question, may be willing to re-think that position, at least in deed if not in word. In the recent *Michigan v. Hudson*[135] case, the Court rejected suppression as a remedy in criminal cases for knock-and-announce violations. In doing so, the Court emphasized what it

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erts as 17th Chief Justice, N.Y. TIMES, Sept. 30, 2005, at A1; Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding,* 94 GEO. L. J. 1589, 1620-21 nn.194-95 (2006).

[132] The state prevailed in four out of the five Fourth Amendment cases decided just this last term, the first in which both Justice Alito and Chief Justice Roberts sat on the Court for at least part of the term. One opinion was unanimous. *See* Brigham City v. Stuart, 126 S. Ct. 1493 (2006). Of the remaining three pro-state opinions, Chief Justice Roberts was consistently in the majority, as was Justice Alito in two of these cases, having taken no part in the decision of one of the cases. *See* Hudson v. Michigan, 126 S. Ct. 2159 (2006); Samson v. California, 126 S. Ct. 2193 (2006); United States v. Grubbs, 126 S. Ct. 1494 (2006) (in which Alito did not participate). In the one pro-defendant decision, *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), Roberts authored a stinging dissenting opinion, while Alito again took no part in the decision. Roberts and Alito were also in the majority in a relevant First Amendment case, in which the Court held that that Amendment was not violated by the alleged demotion of a senior prosecutor for seeking a case's dismissal because a search was based on a warrant affidavit filled with lies, who also testified for the defense at the suppression motion. *See* Garcetti v. Ceballos, 126 S. Ct. 1951 (2006); *see also* Alan Raphael, *Bolstering the Confrontation Clause and Threatening the Exclusionary Rule*, 8 SUP. CT. PREV. 454 (2006) (analyzing the Justices' votes and ideologies on criminal justice issues during the past term).

[133] *See supra* text accompanying notes 108-10.

[134] *Groh*, 540 U.S. at 565 n.8.

[135] 126 S. Ct. 2159 (2006).

saw as the enormously expanded availability since the "hey days" of its exclusionary rule jurisprudence of civil suit remedies for Fourth Amendment violations.[136] This expansion, concluded the Court, made the suppression remedy far less necessary than it had been decades ago, reasoning that could extend well beyond the knock-and-announce situation. If civil remedies are now to be viewed as preferable to the exclusionary rule, that might at least logically support a greater willingness to find police actions outside the protective cloak of qualified civil immunity relative to finding them beyond the good faith exception's shield against criminal case suppression. Under this view, *Groh*, if seen as adopting a mere negligence test, could be understood as doing so only concerning qualified immunity questions, not *Leon* good faith exception questions.

(iv) Limited to Its Facts

Groh also might easily be limited to its facts. Though not alone determinative, the *Groh* Court thought it an important factor that Groh's governmental employer, the ATF, had written policies mandating careful review by search team leaders of warrants to ensure their validity.[137] This Groh had failed to do. In effect, he was doubly negligent, first in not reviewing and correcting the warrant, second in ignoring the notice given by his employer of this task's importance and the violation of its mandatory rules, rules that may reflect its institutional judgment that the scope of its mission required particularly scrupulous care in obtaining and executing valid warrants.

d. Groh*'s Current Significance*

The bottom line concerning *Groh*'s significance is a double-edged sword. On one side of the blade, it seems unlikely that the Court will view *Groh* as reducing the *Leon* super-negligence requirement. Nor is there likely anything about *Groh* that undercuts *Leon*'s application to the police as an institution rather than simply applying to individual officers—an institution sharply separate from other governmental entities, such as the judiciary.[138]

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[136] *Id.* at 2167.

[137] *See Groh,* 540 U.S. at 564 & n.7; *supra* text accompanying notes 117-18.

On the other side of the blade, however, is the current Court's seeming growing hostility to the exclusionary rule.[139] Although the standard proposed here and implicit in *Leon*'s logic requires proof of super-negligence by the police if they are to lose the good faith exception's protection, I argue that such super-negligence can be proven fairly readily absent affirmative steps taken by the police to discourage future constitutional violations.[140] Initially, this approach might expand availability of the exclusionary remedy, an outcome counter to the tenor of the current Court's most recent opinions. However, over time, if police do take the affirmative steps that I suggest, they will have a "safe harbor" ensuring good faith protection.[141] Furthermore, because these steps are flexible ones empowering the police to control avoidance of suppression by numerous means, my proposal may be less invasive of law enforcement choice of means for doing their job than might more precise rules of behavior governing conduct governed by the Fourth Amendment, a sort of incentives-based approach that, I have argued elsewhere in other contexts, the Court may find appealing.[142]

In any event, whether the Court ultimately accepts my proposal here or not, the proposal is nevertheless, I maintain, implicit in *Leon*'s logic (if not necessarily its result) and, apart from *Leon*, is simply a good idea—at least if the good faith exception is to be retained at all. If, as I think unlikely, *Groh* instead portends the good faith exception's death, then I will be happier still, though I hope this article might then still prove to be of some value in better understanding the exclusionary rule.[143]

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[138] *See supra* text accompanying notes 36-137.

[139] *See supra* text accompanying notes 130-35; TASLITZ ET AL., *supra* note 125, at 116-24.

[140] *See infra* Parts III-IV. More precisely, the state likely has the burden of proving the *absence* of super-negligence once a violation of the Fourth Amendment has been shown. *See* 2005 SUPPLEMENT, *supra* note 26, at 569 ("*Leon* suggests that the burden of showing good faith is on the prosecutor.") My position is that the state's burden should be hard to meet absent adequate evidence of police departmental efforts to prevent Fourth Amendment violations.

[141] *Cf.* Robert M. Mark, *Structuring, Negotiating, & Implementing Strategic Alliances*, 1151 PLI 1 Corp 111, 121 (July/August 2006) (illustrating the "safe harbor" concept).

[142] *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006).

E. Taking Stock

This picture of *Leon* is of a Court purportedly committed to an objective standard yet seemingly inconsistently embracing subjective tests of good faith as well. It is likewise a picture in which the objective aspects of the standard require a sort of super-negligence, evincing a grave indifference to the value of constitutional rights to others' lives and to the polity as a whole.

Moreover, the *Leon* Court focused its sight more on the institutional aspects of police wrongdoing than the individual ones while ignoring neither. Furthermore, it saw the institution of the police as akin to a separate legal person, with a distinctive personality or character apart from that of the judiciary, from the rest of the Executive branch, and from more amorphous entities like the government, or even society, as a whole.

But the idea of distinctive institutional personalities responsible for individual wrongful acts of those in their employ where those acts are reflective of a broader organizational moral culpability involving reprehensible indifference to others' fate, ranging from gross negligence to the knowing or purposeful infliction of harm, is familiar to another area of the law: corporate criminal liability. It is, therefore, to a comparison to that sister area of jurisprudence—and to the lessons it offers for the jurisprudence of search and seizure—to which I now turn.

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[143] *See infra* Part III (summarizing my reasons for opposition to the good faith exception but recognizing that some version of it is likely here to stay so long as the exclusionary rule itself survives). I want to emphasize that I see the approach that I suggest here as consistent with *Leon*'s express rationale and implicit logic—a logic of super-negligence entity liability analogous to corporate criminal liability doctrine and theory—*not* with *Leon*'s outcome or that of its progeny. In my view, the Court has been far too liberal in its application of *Leon*'s logic, a point that I hope my corporate liability analogy will help to clarify.

III. CORPORATE CRIMINAL LIABILITY

A. Corporate Personality

1. Character Morality

The most helpful justification for corporate criminal liability for my purposes here lay in a group of theories of criminal liability more generally that operate under the rubric of "character morality." All variations of character morality hold that we should be punished for causing certain harms that stem from who we are rather than merely for what we do.[144] Specifically, character moralities seek to condemn and deter evil character.[145] "Character" is an enduring disposition to behave in particular ways in particular situations. A disposition consists of both thoughts and acts, so neither thoughts nor acts alone show an evil character. Both are required.[146] Furthermore, most character moralities contain a strong expressive component—a primary evil being actions expressing an indifference to the fundamental worth of each unique human being.[147] As applied to criminal law, character moralities recognize that criminal law can deter evil acts, but deterrence alone cannot justify criminal punishment.[148] Civil liability, including civil administrative regulation, can often deter just as well.[149] Criminal liability thus holds the particular power of societal condemnation of morally culpable acts reflective of evil character.[150]

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[144] *See* LAWRIE REZNEK, EVIL OR ILL: JUSTIFYING THE INSANITY DEFENSE 12-13, 41-60 (1997).

[145] *See id.*

[146] *See id.* at 12-13, 42; Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence,* 52 MD. L. REV. 1, 6-14 (1993).

[147] *See, e.g.,* Taslitz, *Civil Society, supra* note 10, at 313-42 (defending "communicative retributivism" while responding to public harms as the defining justification separating criminal from civil liability); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape,* 15 WIS. WOMEN'S L.J. 3 (2000) [hereinafter Taslitz, *Date Rape*] (applying this theory to date rape); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong,* 40 B.C.L. REV. 739 (1999) (applying this theory to hate crimes legislation).

[148] Taslitz, *Civil Society, supra* note 10, at 342-73 (recognizing a role for private, *not* public, retribution, along with deterrence, in tort law); Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability,* 75 MINN.

2. Unique Corporate Personality

Many commentators on, and much of the law of, corporate criminal liability justifies its imposition instead on grounds of deterrence alone and views the corporation as little more than an aggregation of its individual members.[151] The corporate "person" is thus a fiction without an empirical reality. Notions of corporate moral culpability are therefore meaningless.[152]

But, as a newer generation of scholars and policymakers have increasingly come to recognize, this vision of the corporation is seriously flawed. There are "social facts" with as real

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L. REV. 1095, 1115-19 (1991) (tort remedies can compensate corporate victims and administrative agency regulation can deter much corporate wrongdoing, but only corporate criminal liability imposes moral stigma while filling gaps in deterrence).

[149] *See id.* at 313-42; Taslitz, *Two Concepts, infra* note 211, at 45-64.

[150] *See, e.g., See* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY x-xi (2006) (arguing for punishing corporate entities on a sliding scale based on reasonable attribution of blame); Taslitz, *Civil Society, supra* note 10 (articulating a theory of the condemnatory function of criminal law). *But see* V.S. Khanna, *Should the Behavior of Top Management Matter?,* 92 GEO. L. J. 1215, 1223-24 (2003) (arguing deterrence is the primary justification, if any, for corporate criminal liability) [hereinafter Khanna, *Top Management*]; Daniel R. Fischel & Alan O. Sykes, *Corporate Crimes*, 25 J. LEGAL STUD. 319, 323 (1996) (describing corporations as mere "webs of contractual relationships consisting of individuals who band together for their mutual economic benefit").

[151] Professor John Hasnas made both points thus:

> Corporations, like all businesses, are abstract entities. They have no mind in which to form intentions, no hearts in which to conceive a guilty will, and no bodies that can be imprisoned or corporeally punished in response to bad behavior. They have no actual existence apart from the human beings from which they are comprised. How then can corporations be subject to criminal punishment in contradistinction to (and often in addition) their individual members? How can there be corporate as opposed to individual criminal responsibility?

JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW 23 (2006).

[152] *See id.*

consequences for political culture as any physical, material facts.[153] In the social world, corporate persons are real. They have an identity and a unique character separate and apart from that of their individual shareholders, directors, officers, and employees.[154]

Anecdotal evidence supports the public's vision of corporate character.[155] For example, bids to purchase the ice cream manufacturer Ben and Jerry's sparked protests in 1999. The protesters complained that the takeover would "destroy the company's unique personality,"[156] one protestor describing the politically progressive company as "a living, breathing organism that is continually benefiting our planet and communities."[157] Job-seekers likewise know that each corporation is unique some being seen as more "flexible" and "welcoming" to the personal needs of family, others more "staid" or even "cold."[158] Employees also often come to identify with a partic-

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[153] *See* JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1997) (defining "social facts").

[154] *See, e.g.*, PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 32 (1984) ("[C]orporations are not just organized crowds of people. . . . [T]hey have a metaphysical-logical identity that does not reduce to a mere sum of human members."); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 62 (2d ed. 2001) ("Any consideration of corporate liability which ignores the complex process of social construction will be arid and unproductive."); *id.* at 63-83 (summarizing arguments that corporations have a metaphysical, moral, and legal existence separate from the individuals comprising them).

[155] *See* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POL'Y 833, 847 (2000) ("Anecdotal evidence confirms that, unlike the inanimate matter of steel and glass office buildings, corporations have . . . a presence in the community . . . quite apart from that of its owners, managers, and employees.").

[156] William Lowther, *US in a Stir Over Ice Cream Hippies*, MAIL ON SUNDAY, Dec 19, 1999, available at 1999 WL 21947574.

[157] *Id.; see also* Friedman, *supra* note 155, at 847 (discussing the Ben and Jerry's protests).

[158] *See* Friedman, *supra* note 155, at 847. Friedman elaborates, noting these statements about Ben and Jerry's

> betray[ ] the public's perception that corporations are "alive," and can act, through their agents, in specific ways. It reflects a truism that employment-seekers in the corporate world know only too well: All corporations are not alike. Each corporation has its own culture, its own way of training employees, its own preferred practices. These aspects of cor-

ular corporation's values and attitudes.[159] Thus one commentator has described the distinct personalities of major oil companies: Texaco, "with its selfishness and greed cultivat[ing] a reputation for meanness and secrecy";[160] Mobil as "the most sophisticated of American [oil companies] . . . much concerned with communications and image";[161] Exxon as "tranquil," operating in a "rarefied" atmosphere "full of rhetorics of global responsibilities"; and Shell as "lordly and sedate," with an "obsessive introversion."[162] Social scientists have likewise traced the variety of corporate personalities, and middle managers have themselves in interviews overwhelmingly opined that unethical corporate behavior stems from unique corporate cultures.[163]

3. Corporate Personality as Distinct from that of Its Individual Members

Individuals may have a say in corporate decisionmaking, but many contribute to but a small part of the decisionmaking process, unaware of its totality or its implications.[164] Each in-

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> porate life have a cumulative weight, and the institutionalized relationships and practices of each corporation collectively denote a unique character. And so we tend to speak of corporations "as 'real' entities in ordinary language and in moral discourse . . . ."

Id. at 847 (quoting in part Eric Colvin, *Corporate Personality and Criminal Liability,* 6 CRIM. L.F. 1, 24 (1995)). Social science research supports the impressions created by anecdote. *See* WELLS, *supra* note 154, at 40-62 (explaining how social psychological work on the attribution of moral responsibility demonstrates that individuals attribute such responsibility to corporations and not only individuals).

[159] *See, e.g.,* A. LARRY ELLIOTT & RICHARD J. SCHROTH, HOW COMPANIES LIE: WHY ENRON IS JUST THE TIP OF THE ICEBERG 111 (2002) ("Inside the organizations, team leaders and loyal workers are inundated with motivational messages about the work they do and the progress of the corporation. They come to accept and believe what they hear and do what they are asked to do.").

[160] ANTHONY SAMPSON, THE SEVEN SISTERS 196-97 (1975).

[161] *Id.* at 193.

[162] *Id.* at 8, 191; *see* Bucy, *supra* note 148, at 1124-27 (summarizing these studies and interviews).

[163] SAMPSON, *supra* note 160, at 11.

[164] As Professor Susanne M. Kim put it:

> [I]n most instances, individual participants may contribute a small part to a collective decisionmaking process without necessarily being

dividual contributor may have very different reasons for supporting a particular action, while many may disagree with it entirely.[165] Furthermore, corporate culture, once established, itself tends to shape the social norms of the individual participants, shaping their behavior as much as being shaped by it.[166] In these ways, among others, the corporation has an existence and behavioral propensities distinct from any individuals or their aggregation.[167] The law recognizes distinct corporate identity as well. Individuals come and go, yet the corporate person continues as a distinct and legally stable entity.[168] Corporations have rights, most of which are not different in character from those granted individuals.[169] Corporations can

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> aware of the totality of that process. Certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated into the bigger picture. As a result, none of them fully understand the larger implications of their singular contributions. It is not appropriate in such cases to pinpoint the final intent of the corporation on specific individuals who each played only a small role in forming the intentionality of the corporation . . . .

Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations,* 2000 U. ILL. L. REV. 763, 790.

[165] Virginia Held, *Corporations Persons, and Responsibility, in* SHAME, RESPONSIBILITY AND THE CORPORATION 159, 171-72 (Hugh Curtler ed., 1986) ("[I]t is much more believable to think that as a multitude of persons with varying amounts of power and influence contribute to a corporate decision, the outcome is plainly shaped in ways that produce corporate 'intentions' quite different from those that entered into the process."). Held offers as an example a situation in which the decision to move a corporate plant comes about, though not reflecting the true and varying intentions of any of the individual executives involved in the decision-making process. *See id.* at 171.

[166] *See* Kim, *supra* note 164, at 791 ("To the extent that human beings are involved in corporate actions, they act on behalf of the corporation, and within the parameters of the corporation's goals, policies, and preferences."); Bucy, *supra* note 148, at 1127 ("[T]he formal and informal structure of a corporation can promote, or discourage, violations of the law . . . .").

[167] *See* WELLS, *supra* note 154, at 1-2, 63-83 (defending this independent entity liability theory of corporate personhood against more individualistic theories of corporate responsibility); Kim, *supra* note 152, at 806 ("[C]orporations can be held responsible, both legally and morally, for their intentions, actions, and character.").

[168] *See* Kim, *supra* note 164, at 786.

[169] *See* William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1293 (2000); BYRON L. SHERWIN, GOLEMS AMONG US: HOW A JEWISH LEGEND CAN HELP US NAVIGATE

be defamed, their property stolen, their contracts wrongly broken.[170] The law sees them as subject to injury and worthy of redress as well as capable of harm and subject to punishment.[171] The overall popular and legal picture of the corporation is as a person capable of acting with intentions and of modifying its actions once learning of the harmful consequences they may cause[172]—the two key pre-requisites, in the view of several commentators, for moral and criminal culpability.[173]

THE BIOTECH CENTURY 164-65 (2004) (arguing that corporations in practice have greater legal rights than natural persons). An important exception to the rule of corporate/natural person equality of rights is that corporations lack the protection of the Fifth Amendment privilege against self-incrimination. *See* TASLITZ & PARIS, *supra* note 1, at 719-21. Some commentators bemoan this near-equality of corporate and natural persons' rights. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 43-48 (2001) (maintaining America has created corporate persons with the rights of individuals but not their moral conscience, a development so dangerous that it "threaten[s] not just American society but world society"); SHERWIN, *supra*, at 185 ("Relieving corporations of the rights and privileges of natural persons, and limiting their influence over the government, would be important steps in placing corporations under effective oversight," though the author would nevertheless subject them to the same civil and criminal liabilities facing natural persons).

[170] *See* Laufer & Strudler, *supra* note 169, at 1293.

[171] *See id.* at 1293 (noting corporate vulnerability to injury and entitlement to redress); HASNAS, *supra* note 151, at 23-29 (noting corporate exposure to criminal liability, though regretting it given the corporation's lack of a privilege against self-incrimination).

[172] Says Professor Kim:

> As a practical matter it is cognitively incongruous to maintain that the corporation is a fiction in light of everyday experience. We regularly observe and interact with corporations as entities. We read newspaper accounts of corporate mergers and acquisitions, follow lawsuits alleging corporate manufacturing of defective products, acknowledge corporate gifts to charities and good causes, and remit our monthly payments to utility companies. Our own experience tells us that corporations are not merely fictional creatures. To insist that they are denies the empirical reality of their existence. The more sound approach is to view the corporation as a real person with separate and independent rights and obligations rather than as an imaginary, artificial person.

Kim, *supra* note 164, at 786-87 (explaining why corporations should be held morally and criminally responsible for their wrongdoing).

[173] *Id.* at 794 ("Because a corporation has the capacity to be an intentional actor and to modify its actions after learning of unintended harmful consequences, it may be regarded as a morally responsible being."). Professor Kim elaborates:

Perhaps the most relevant aspect of the law governing corporations from the perspective of expressive character morality is the judicial willingness to accord free speech rights to the corporate form.[174] The judiciary recognizes that speech is "indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[175] Corporate citizens, like individual ones, are seen as having the capacity to express independent moral judgments in public discourse.[176] Even opponents of the granting of free speech rights to corporations ground their opposition partly in a fear of the power of corporations to influence public discourse and to therefore shape public norms, including those norms embodied in the law.[177] Corporate voices affect attitudes toward, and the content of, environmental regulation, campaign finance, religious freedoms, workplace safety, willingness to wage war, and a host of other political and legal concerns.[178] Corporate expression affects "discussion and debate about a community's problems, fears, and hopes, including determinations about the conduct which should be

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> Corporations satisfy both the input and output conditions for moral responsibility. They make decisions, have rights and duties in law, carry on nonlegal relationships with other corporations and with human persons; in short, they participate in the whole spectrum of activities and relationships we associate with persons. Not only are corporations persons in a full-fledged moral sense, but [they] are essential elements of the moral world.

Kim, *supra* note 164, at 794.

[174] Friedman, *supra* note 155, at 848-52.

[175] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (internal citation omitted).

[176] Friedman, *supra* note 155, at 849-51.

[177] *See, e.g.,* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 179-84 (1986) (protecting corporate speech alters the balance of expressive power in society, threatening to drown out alternative points of views); OWEN FISS, LIBERALISM DIVIDED 15-16 (1996) (similar).

[178] *See generally* ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY (2004) (extended argument that corporate domination of the media distorts democratic policymaking in a wide range of areas); R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE (1997) (drawing on tobacco, internet, and other advertising examples to illustrate the corporate promotion of a hyper-commercial culture).

deemed laudable, and that conduct which should be condemned."[179]

A corporation is therefore recognized as having an identifiable persona separate from that of any individuals and capable of expressing independent judgments and attitudes "entirely unrelated to the personal views of their owners, managers, and employees."[180] Consequently, corporations can express through autonomous actions their indifference to, or even intentional degradation of, human worth.[181] This independent expressive capacity, reflective of corporate choice and evil character, is what warrants corporate criminal liability.[182] Such liability is designed to condemn the demeaning messages sent by morally inappropriate corporate action while working to achieve a form of corporate penance, redemption of evil character through contrition combined with strenuous efforts at positive personality change.[183] As one law reformer has put it, corporate "criminal liability 'sends the message' that people matter more than profits and reaffirms the value of those who were sacrificed to 'corporate greed.'"[184]

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[179] Friedman, *supra* note 155, at 851-52. Friedman also notes: "Corporations, like individual members of a community, participate in the process of creating and defining social norms, and in so doing distinguish themselves from those individuals." *Id.* at 852.

[180] *Id.* at 852.

[181] *See supra* text accompanying notes 144-50 (on expressive evils of criminal conduct); SHERWIN, *supra* note 169, at 164-83 (illustrating some ways in which corporate choices have sent degrading messages about human worth); *see generally* ELLIOT & SCHROTH, *supra* note 159 (explaining how current corporate governance and other structures foster lies, inflicting widespread social harm to which corporations often seem indifferent); MITCHELL, *supra* note 169, at 43-48 (arguing maximization of stock price is pursued as the sole corporate goal, regardless of the impact on the worth of individual and collective lives).

[182] *Compare* Bucy, *supra* note 148, at 1121-27 (maintaining that a corporation's "ethos"—its "characteristic spirit or prevalent tone of sentiment" is what justifies corporate criminal liability), *with* Kim, *supra* note 164, at 779-808 (arguing that corporations have unique characters and that evidence of such character should sometimes be admissible at criminal trials as relevant to moral and legal culpability).

[183] *See* Friedman, *supra* note 155, at 855; *see* KIM SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1990) (arguing that the condemnatory, retributive purposes of the criminal law primarily justify corporate criminal liability while also promoting deterrence and reform).

[184] Friedman, *supra* note 155, at 855 (*quoting in part* Dan M. Kahan, *Social*

B. Proof Problems

1. Corporate Ethos

Even if this sounds nice in theory, how can it be put into practice? After all, if a corporation has an existence independent of the individuals that compose it, how can we show that an individual action was done as the agent of a morally culpable corporation rather than as a rogue action of the individual himself, not attributable to the organization at all? Peter French began developing an answer to this question in his idea of a "corporate internal decision structure" or "CID."[185] The CID consists of a flowchart defining the levels and positions within the corporation representing its decisionmaking processes, the "internal recognition" rules identifying the collective nature of those processes, and the "policy recognitors" representing the "basic beliefs of the corporation."[186] These things in combination constitute corporate intention.[187] French explains:

> [W]hen the corporate act is consistent with an instantiation or implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intention . . . .[188]

Law professor Pamela Bucy has built on French's concept of corporate mens rea to link it more closely to corporate personality while adding a specificity improving the concept's practicability. Bucy rests criminal liability on "corporate ethos," defined as the "abstract, and intangible character of a corporation separate from the substance of what it actually does,

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Meaning and the Economic Analysis of Crime, 27 J. LEGAL STUD. 609, 618-19 (1998) (footnotes omitted)).

[185] FRENCH, *supra* note 154, at 41.

[186] *Id.*; *see also* SCHLEGEL, *supra* note 183, at 81 (explaining these aspects of French's theory).

[187] *See* SCHLEGEL, *supra* note 183, at 81-84.

[188] FRENCH, *supra* note 154, at 44.

whether manufacturing, retailing, financing, or other activity."[189] Ethos can include such "[s]uperficial things as the manner of dress and the camaraderie of the employees" and such formal things as "written goals and policies."[190] The corporate ethos test does not require the state to determine what individual, if any, within a corporation committed or encouraged the criminal act. It is sufficient to show that some corporate agent did the act and was encouraged to do so by the corporate ethos.[191] To show that reprehensible conduct occurred in the accounting department while the corporate ethos in fact encouraged criminality in the research and development division is insufficient.[192] Liability must follow only when an identifiable corporate ethos has encouraged criminal behavior.[193] Bucy identifies numerous concrete ways to identify such encouragement. Here is a whirlwind summary of seven indicators of particular relevance:

1. *Hierarchy*: Are the Board of Directors so organized, or the corporate structure so complex, as to encourage either criminality or top-level ignorance of it?[194]

2. *Corporate Goals*: For example, if the corporation values profits over all else, that might encourage criminality. The recent Enron example comes to mind.[195]

3. *Educating Employees*: Has the corporation made adequate efforts to educate its employees about their moral and legal responsibilities?[196]

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[189] Bucy, *supra* note 148, at 1123.

[190] *Id.* at 1123.

[191] *See id.* at 1128.

[192] *See id.*

[193] *See id.* at 1127-28.

[194] *See id.* at 1129.

[195] *See id.* at 1133 (making this point); ELLIOT & SCHROTH, *supra* note 159, at 26-27, 66-69, 87-88, 117, 119 (summarizing the central aspects of the Enron fiasco).

[196] *See* Bucy, *supra* note 148, at 1134.

4. *Punishing the Current Offense*: This factor asks whether the corporation made prompt, serious efforts to investigate and punish the current offense while deterring future similar offenses.[197]

5. *Monitoring Compliance with Legal Requirements*: This factor examines such things as sound internal audits and open door policies to create an atmosphere in which errors are actively uncovered and sought to be corrected as a matter of corporate routine.[198]

6. *Reaction to Past Violations*: Has the corporation made redress for past wrongs and made efforts to prevent their repetition?[199]

7. *Reward Structure and Indemnification Policies*: This last factor asks whether the compensation structure creates incentives for lawfulness or criminality. Too easy willingness of the corporation to indemnify individual malfeasants can create incentives for wrongdoing, this factor also recognizes.[200]

Most of these factors embrace a commitment to keeping corporate management and directors fully aware of criminality committed within subdivisions and units or by individuals.[201] Willful, or even negligent, blindness is not an option for a corporation wishing to avoid an attribution of ethos-induced criminality.[202] These very practical factors will, it should be noted, shortly be shown to have particular salience in crafting rules for police entity liability for constitutional violations as well.

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[197] *See id.* at 1138.

[198] *See id.* at 1136-37.

[199] *See id.* at 1138-39.

[200] *See id.* at 1139-41.

[201] *See id.* at 1105 (criticizing the Model Penal Code approach to corporate criminality as allowing the avoidance of corporate criminality where higher echelon officials "maintain unawareness" of criminality).

[202] *See* United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990) (explaining the willful blindness or "ostrich" doctrine as treating an accused as acting knowingly when he strongly suspects that he is involved in shady dealings but "takes steps to make sure that he does not acquire full or exact knowledge"); Ira Robbins, *The Ostrich Instruction: Deliberate Ignorance as Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990). Note that under an ethos-liability model for

a. Collective Knowledge

Another helpful concept of corporate criminal liability is that of collective knowledge, a concept embraced by numerous courts.[203] The collective knowledge concept, when applied, prevents a corporation from pleading that ignorance by a higher echelon (a relevant or important) agent of matters purportedly known only to an isolated or lower-level agent shields the corporation itself from a finding of the necessary corporate mens rea.[204] One court elaborated thus:

> [K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who should then have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.[205]

An ethos-informed version of corporate criminal liability rules might reject "collective knowledge" as a fiction that purports to aggregate individuals' knowledge.[206] Nevertheless, a

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corporate criminality, *inaction* by the corporation, that is, the absence of affirmative corporate steps to keep management and directors fully informed about criminality within the corporate ranks, is sufficient mens rea to impose corporate liability; some commentators criticize any application of the willful blindness doctrine to pure inaction, seeing that as more akin to negligence than to knowledge. *See Giovannetti*, 919 F.2d at 1230. But the corporate ethos-liability approach views gross (i.e., criminal) negligence as adequate to justify corporate punishment.

[203] *See* Bucy, *supra* note 148, at 1156-57.

[204] *See* WELLS, *supra* note 154, at 134-35 (explaining the collective knowledge doctrine).

[205] United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738-39 (1962); *see also* WELLS, *supra* note 154, at 134 (analyzing the *T.I.M.E.-D.C., Inc.* case).

[206] *See* Bucy, *supra* note 148, at 1156-57. Bucy argues that traditional tests for corporate criminal liability, specifically the respondeat superior and Model Penal Code tests, which are discussed *infra* text accompanying notes 216-32, relieve

concern with corporate character does require an inquiry into what all individuals knew and a determination whether the corporate ethos encouraged, tolerated, or permitted the ignorance of other units and of managerial agents capable of correcting errors concerning criminal conduct.[207] In effect, the corporation is often charged with the collective knowledge of its agents if it has not implemented sound internal procedures for

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corporations from liability whenever it is not possible to identify the precise corporate agents responsible for a crime, even though it is clear that corporate conduct of some kind caused the harm. *See id.* at 1156. This failure of liability occurs because these tests require proving criminal intent by at least one corporate agent, imputing that intent to the corporation. Courts thus often turn to the collective knowledge fiction to find the necessary intent where justice seems to require it. *See id.* at 1156-57. In this way, corporations are not rewarded for a culture of ignorance or indifference. Bucy prefers the ethos standard because it avoids this fiction (adding up individual mental states to form a "corporate one") by focusing more directly and candidly on corporate actions creating an ethos that encourages criminality, actions including those permitting or enforcing widespread or upper level blindness to criminal wrongs. *See id.* at 1156-57.

[207] For example, if a corporate agent had relevant information about criminality or engaged in it and management had implemented inadequate monitoring devices, thus not discovering the wrongdoing, or failed to investigate and correct wrongdoing that was brought to their attention, that would be evidentiary of a corporate ethos promoting criminal conduct. *See id.* at 1136-40.

Interestingly, some courts have taken the collective knowledge fiction so far as to approach an ethos-liability standard. Thus in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), a bank's conviction for failing to report numerous customer currency transactions over $10,000 each was affirmed, though only a single bank teller knew of the amount involved in each transaction. The relevant statute required "willful" violation, meaning knowing of the law's reporting mandate, and the trial judge had instructed the jury that aggregating individual employees' intent could establish willfulness, doing so even though there was, argued the bank, no evidence of an intent to commit the crime. Professor Wells summarized the appellate court's logic in a way that smacks of the logic of ethos-liability:

> The court said that collective knowledge is appropriate in this context since "corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components." Rejecting the corporation's argument that it was effectively being punished for having a poor communications network, the court said that the aggregate of those components constitutes the corporation's knowledge of a particular operation, and it is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another.

WELLS, *supra* note 154, at 135.

the discovery and dissemination of knowledge, including to the most relevant decisionmaking personnel for each particular issue.[208]

b. A Corporate Mens Rea Spectrum

Different criminal statutes provide, of course, for different degrees of mens rea, ranging from negligence, to recklessness, to knowledge, to purpose.[209] Ordinary tort negligence is insufficient in most jurisdictions to impose criminal responsibility.[210] Only gross or criminal negligence demonstrates the extreme indifference to human worth that justifies criminal liability.[211] Negligence—as a purely objective concept—is the easiest one to prove in the corporate context.[212] But, since a corporation, while a social and legal person, is still not a human being, how can we hold it criminally responsible for such subjective state-of-mind requirements as recklessness, knowledge, and purpose? The answer: we can't. But we can do the next best thing, argue Professors William S. Laufer and Alan Strudler: we can recognize a form of "objective mens rea," or "constructive corporate fault."[213] Thus, argue Laufer and Strudler, we must ask "whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind."[214]

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[208] *Cf.* Bucy, *supra* note 148, at 1155-56 (arguing correspondingly that corporations do not have a lawless ethos when even high level employees have an evil mental state but the corporation had made serious efforts to educate its employees about the specific illegality involved and made solid efforts to discourage it).

[209] *See, e.g.,* MODEL PENAL CODE § 2.02 (defining these four types of mental state).

[210] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 129-30 (3d ed. 2003).

[211] *See id.* at 130; Taslitz, *Date Rape*, *supra* note 147.

[212] Indeed, negligence, because it does not require an inquiry into a subjective state of mind or its analogues but rather involves a deviation from a desired standard of conduct, is the easiest to prove of all the "standard" mental states recited in the Model Penal Code. *See* Taslitz, *Willfully Blinded*, *supra* note 58, at 438-46 (analyzing the proof advantages of criminal negligence liability over more subjectie mental states); MODEL PENAL CODE § 2.02(2)(d) (defining criminal negligence).

[213] *See* Laufer & Strudler, *supra* note 169, at 1308-12.

[214] *Id.* at 1310.

The inquiry would turn on reasonable inferences rather than any subjective exploration of the subjective state of mind of a particular significant individual in the corporation and would require courts to wrestle with the same kinds of evidence and inferences involved in gauging the mental states of biological persons.[215] Thus, Laufer and Strudler state in summary:

> Evidence of purposeful action is reflected in a desire to engage in certain illegal behavior. Policies and practices that explicitly or implicitly promote and encourage illegality, efforts to ratify or endorse the violation of law, and express or tacit authorization, approval, consent, or support of the illegality reveal purposeful corporate action. For knowledge, courts inquire: Did the organization permit or tolerate the illegality? Was there evidence that the corporation was willing to allow the illegality? Given any evidence of actual awareness, permission, toleration, or willingness, would an average corporation of like size and structure have been aware of the nature of its conduct? A reckless entity disregards a substantial and unjustifiable risk of harm.[216]

Corporate action can, therefore, be consistent with more subjective concepts of intentional, knowing, or reckless wrongdoing. But, at a minimum, corporations will face criminal negligence liability under this model for dereliction of both the duties to be informed and to create internal structures that discourage and correct socially harmful, criminally culpable behavior.

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[215] *Id.*

[216] *Id.*

C. The Current State of the Law

1. Strict Vicarious Liability Regimes

Corporate case law and legislation often purport to embody principles of strict vicarious liability through the doctrine of respondeat superior.[217] A strict liability regime is, however, inconsistent with a character morality because it can result in liability for the acts of individual agents that in no sense stem from the corporation's ethos.[218] Moreover, although strict liability regimes are intended to make corporate prosecutions easy and to prod corporate internal control mechanisms, in practice such regimes often foster corporate ignorance, internal denial, and an evasion of corrective mechanisms.[219] This is so because any evidence of wrongdoing by an agent intending to benefit the corporation can expose it to liability. It is better for the corporation, therefore, not to generate such evidence in the first place, so that the cause of a harm cannot be provably linked to a specific *corporate* actor.[220] As I will discuss shortly, in practice the law is moving away from this purported embrace of a strict liability regime.

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[217] *See* Bucy, *supra* note 148, at 1102-03. Bucy summarizes this doctrine:

> Derived from agency principles in tort law, it provides that a corporation "may be held criminally liable for the acts of any of its agents [who] (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation." As construed by most courts, the latter two requirements are almost meaningless.

Id. at 1102. Vis-à-vis the corporation, this doctrine exposes the entity to strict liability, liability applying in the absence of corporate wrongdoing:

> Courts deem criminal conduct to be "within the scope of employment" even if the conduct was specifically forbidden by a corporate policy and the corporation made good faith efforts to prevent the crime. Similarly, courts deem criminal conduct by an agent to be "with the intent to benefit the corporation" even when the corporation received no actual benefit from the offense and no one within the corporation knew of the criminal conduct at the time it occurred. With these latter two requirements thus weakened, a corporation may be criminally liable whenever one of its agents (even an independent contractor in some circumstances) commits a crime related in almost any way to the agent's employment.

Id. at 1102-03. *See also* V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?,* 37 AM. CRIM. L. REV. 1239, 1246 (2000) (equating respondeat superior with strict liability as applied in the corporate criminal context).

[218] *See* Bucy, *supra* note 148, at 1104 (noting that the respondent superior approach means that "all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct").

[219] *See* Khanna, *Top Management, supra* note 150, at 1228-29.

2. The MPC Due Diligence Regime

Another influential model of corporate criminal liability is that of the Model Penal Code ("MPC").[221] Under the most commonly used of the three MPC corporate liability standards, a corporation is criminally liable if its conduct was "authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."[222] This standard limits the respondeat superior doctrine to actions by some high-level agents.[223]

Yet, from the perspective of character morality, this is an overly-broad standard. Absent corporate mens rea revealing acts encouraged by the corporate ethos, the corporation should not be responsible even for the behavior of its high managerial agents.[224] Nor, because the corporation is an entity distinct from the individuals that comprise it, should any individual's intent automatically be imputed to the corporation.[225]

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[220] *See id.* It should be noted, however, that Khanna considers strict liability and negligence standards each to have their respective benefits in certain situations but not others. *See id.* at 1231. I need not explore these subtleties here because any strict liability standard is inconsistent with a character-based morality like that embraced by ethos-liability. *See generally* Bucy, *supra* note 148. Moreover, remember that I am reviewing the law and scholarship on corporate criminal liability as an analogy to guide police liability under the good faith exception to the exclusionary rule, an exception that unquestionably is *not* based on strict liability and could not be under the Fourth Amendment's "reasonableness" test. *See supra* Part III.

[221] *See* Bucy, *supra* note 148, at 1103.

[222] MODEL PENAL CODE § 2.07(i)(c) (Proposed Official Draft 1962). The other two situations in which the Code imposes corporate liability are for mere violations or similar offenses showing a plain legislative purpose to impose corporate liability and the conduct was of a corporate agent acting on its behalf within the scope of his employment, and an offense consisting of "an omission to discharge a specific duty of affirmative performance imposed on corporations by law." *Id.* § 2.07(i)(a), (b).

[223] *See* Bucy, *supra* note 148, at 1103.

[224] *See id.* at 1104-05 (noting that MPC permits imposing liability on blameless

At the same time, the MPC standard can unduly narrow criminal liability by denying it when a lower-level agent's actions were indeed the result of the corporation's ethos.[226] Moreover, the MPC test creates an incentive for higher echelon officials to insulate themselves from knowledge of lower-level agents' malfeasance, an ignorance of which these employees will be aware and which may, therefore, encourage their continued criminality.[227]

Yet the MPC makes an important nod toward a character morality by providing for a due diligence defense.[228] Under this defense, a corporation can evade liability by demonstrating by a preponderance of the evidence that it exercised due diligence to prevent the crime.[229] The due diligence defense squarely shifts the focus from an individual agent's knowledge and behavior to that embraced in the corporation's structure, practices, and policies—in short, in its ethos.[230]

A character-morality approach would also inquire into due diligence, but the burden would be on the prosecution to show

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corporations even where a maverick employee acts contrary to corporate rules and practices but happens to qualify as a high managerial agent).

[225] *See id.* at 1105 ("By automatically imputing the intent of an individual within the corporation to the corporation, the MPC standard, like the traditional respondeat superior standard, provides for inappropriately broad liability.").

[226] *See id.* at 1105.

[227] *See id.* at 1105; Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 670-72 (2000) (analyzing willful blindness doctrine in the corporate context and defending a variant of it).

[228] *See* MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962); Laufer & Strudler, *supra* note 169, at 1299-1301 (explaining the MPC due diligence defense and its state analogues), 1307-08 (defending a "proactive fault" regime attributing liability to a corporation when its "practices and procedures are inadequate to prevent the commission of a crime," an approach that, while not identical to ethos liability, seems to have much in common with it).

[229] *See* Bucy, *supra* note 148, at 1162-63.

[230] *See id.* Under an ethos-liability standard, however, due diligence is a factor, not alone necessarily determinative, in judging the presence of a culpable ethos. *See id.*

its absence rather than on the defense to show its presence.[231] A sound approach to due diligence would also reject reactive fault—requiring a corporate effort to correct wrongdoing only after it is discovered—because it leaves culpable corporate indifference unpunished until the uncertain and perhaps long-coming point when the state uncovers it and, even then, insulates the corporation from liability if it thereafter falls into line.[232] Proactive fault—requiring corporate efforts to prevent wrongdoing in the first place and holding it fully responsible for their absence—is both fairer and a better deterrent.[233]

3. Compliance and Related Programs and Corporate Fault

Prosecutors have moved away from strict liability regimes as well by using compliance programs as evidence of due diligence, justifying diversion programs.[234] *Federal Prosecutorial Guidelines for Diversion*, for example, consider such things as whether the corporation has made full disclosure of wrongdoing, implemented a well-designed and effective compliance program, failed to learn from prior mistakes, identified the culprits within the organization, disciplined them, and paid restitution.[235] The United States Sentencing Commission has also stepped into the fray, adopting *Guidelines for Organizational Defendants* that fine-tune the severity or leniency of corporate criminal sentences based upon such factors as the establishment of compliance procedures that are actually implemented and reasonably capable of reducing the prospect of criminal conduct, the implementation of special policies to address the particularly high risk of deviance in particular business sectors, the efforts made to communicate legal and ethical standards effectively to employees, the consistent discipline of both wrongdoers and those responsible for failing to detect their behavior, the taking of reasonable steps at compliance with the law via monitoring and auditing systems, and the willingness to admit guilt and cooperate with the prosecution.[236]

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[231] *See id.*

[232] *See* Laufer & Strudler, *supra* note 169, at 1308 (discussing reactive fault and its weaknesses).

[233] *See id.* (defining proactive fault but criticizing it and even ethos liability as creating only a form of negligence liability when, in the authors' view, corporate liability must be graded based upon corporate mens rea akin to the MPC negligence, recklessness, knowledge, purpose spectrum, an approach they label "constructive corporate fault"). I see no inconsistency between the ethos and constructive corporate fault approaches, for ethos-liability is a good guide to corporate negligence, while constructive fault recognizes that even greater degrees of evil corporate conduct can be shown. But a mens rea spectrum to impose respectively higher penalties is in one sense unimportant for my purposes, for the exclusionary rule permits only one sanction: suppression. In any event, super-negligent mental states inherently prove grossly unreasonable behavior, and the repeated references to reasonableness in *Leon* and its progeny suggest that criminal negligence, though not ordinary tort negligence, is sufficient to overcome any claim of good faith.

[234] *See* Laufer & Strudler, *supra* note 169, at 1299. Professor Laufer has more recently cautioned that corporations sometimes structure compliance programs to enhance their reputations as good citizens and give the appearance of deterring wrongdoing rather than the reality, suggesting ways that the law can prevent corporations from snookering prosecutors. *See* LAUFER, *supra* note 150. Similar dangers may lurk in police departmental reform efforts, requiring vigilant defense counsel and the availability of adequate defense discovery options to prevent good faith efforts from degenerating into an elaborate police public relations campaign. *See infra* Part IV.

Again, these are standards seeking to identify actions stemming from flawed corporate character, guiding sentencing authorities in choosing among such penalties as community service, fines of varying sizes, structural interventions into corporate operations and management, day fines, and the suspension of business activities.[237] The flaw in the *Guidelines* is only that they kick in too late—after the condemnation accompanying a verdict of guilt of a crime has been announced, based largely or entirely on inappropriate principles of strict liability.[238]

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[235] *See* Laufer & Strudler, *supra* note 169 at 1303; U.S. Department of Justice, *Guidance on Prosecutions of Corporations*, June 16, 1999, reprinted in BNA Compliance Manual, 41 *Prevention of Corporate Liability* 1200 (1999).

[236] *See* Laufer & Strudler, *supra* note 169, at 1305-07; U.S. SENTENCING GUIDELINES MANUAL, ch. 8, *Sentencing of Organizations* (2004); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); Association of Corporate Counsel, *The New Federal Sentencing Guidelines for Organizations: Great for Prosecutors, Deadly For the Privilege*, www.acca.com/protected/article/attyclient/sentencing.pdf (March 2005); LAUFER, *supra* note 150, at xiii, 42-43, 63-65, 71, 103, 112, 115, 118-19, 134, 139, 184, 191-92, 195 (summarizing and analyzing the most recent versions of the federal organizational sentencing guidelines and related policies).

[237] *See* GUIDELINES MANUAL, *supra* note 236, §§ 8A1-8D, at 468-512; STRADER, *supra* note 42, at 323-24 (summarizing some of these penalties); HASNAS, *supra* note 151, at 45-55 (summarizing many aspects of the organizational guidelines

In sum, both the law of, and commentary on, corporate criminal liability are moving toward—without having yet reached—a character-based model condemning serious culpable indifference stemming from a unique and independent corporate personality. This model of corporate liability is designed to encourage internal corporate systems for the generation and dissemination of information about wrongdoing, the creation of proactive compliance systems and auditing procedures, the deterrence of future crimes, the education of employees in proper moral and legal standards, and the swift punishment of wayward individuals.

Corporations implementing the proper systems, however, have not engaged in *corporate* wrongdoing and should not be punished for resulting harm. Some commentators have gone even further, seeing the level of ambiguity of criminal statutory prohibitions as so extraordinarily high as also to justify a true "mistake of law" defense where a corporation could not reasonably have been on notice that the conduct it was encouraging or tolerating was *criminal*.[239]

This fault-based model of organizational moral culpability, with some fine-tuning, turns out to be a helpful model for understanding *Leon*'s concept of the organizational culpability of the police for bad faith conduct in performing searches and seizures. I now turn to exploring the degree to which the character-based model of corporate criminal liability can be transferred to the police context.

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and the incentives they create in detail).

[238] *See* Bucy, *supra* note 148, at 1160. *See generally* Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines,* 1 OHIO ST. J. CRIM. L. 487 (2004) (summarizing strengths and weaknesses of the federal organizational guidelines and proposing remedies).

[239] *See* Bucy, *supra* note 148, at 1147-48.

IV. THE POLICE AND MORAL CULPABILITY

A. Similarities Between Corporate and Police Department Moral Culpability

What similarities do police departments and units bear to culpable corporate criminals? Arguably many, including these: (1) a distinct departmental character (2) capable of sending powerful messages about human worth (3) that stem from an internal structure making these messages reflective of a corporate, departmental mental state.

1. Distinct Police Character

a. Law and Popular Culture Paint a Picture of a Police Character

In the public mind and in practice, the police as a whole have an identity distinct from that of other governmental entities or from the "government" seen as an amorphous whole.[240] No one confuses police officers with postal workers, sanitation workers, firemen, or school teachers.[241] Police shows like *NYPD Blue* and the various *Law and Order* incarnations have appeal to their audiences because of public perceptions of the police as a unique arm of the government.[242] It is the police whom most Americans trust to get the bad guys.[243] Judging from TV shows, however, it is also the police whom the public expect to cross the lines drawn by the law where needed to win the fight against evil—a crossing often winked at by the ordinary citizen.[244] The police, though perhaps inevitably corrupted by their contact with evil, are the "thin blue line" that stands between us and chaos.[245]

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[240] *See generally* CHRISTOPHER P. WILSON, COP KNOWLEDGE: POLICE POWER AND CULTURAL NARRATIVE IN TWENTIETH-CENTURY AMERICA (2000) (analyzing public images of policing in America over time); *infra* text accompanying notes 254-67 (discussing police self-image).

[241] *See* KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 31 (2004) (noting that the characteristics of modern policing include its being done by a single, distinct organization, with city-wide jurisdiction and centralized control, serving a specialized function (policing) done by salaried personnel retaining continuity via the continued existence of the office and its characteristic procedures and embracing a preventive orientation providing round-the-clock service).

[242] *See* WILSON, *supra* note 240, at 3, 212-17 (discussing *NYPD Blue* and similar shows).

[243] *See* RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES 42 (2d ed. 1998) ("Crime fighters are portrayed as being very effective

Not everyone embraces this tainted but still positive vision of the police. Members of racial minority groups may in particular worry that they will be victimized, rather than protected, by the police.[246] Yet minorities' anger at the police also often stems from the sense that the police are not protecting minority communities as effectively as white ones. They *want* the officers to be knights in blue, though they more frequently expect muddied, fallen knights than those on steeds.[247] Moreover, their wariness is of the police as a distinct and special arm of the state. A query from a postman about how to find a particular address or person simply does not excite the same level of anxiety as does the same query from a police officer.

The mass media, of course, tell recurring tales of *individual* officers' lives.[248] Yet TV shows always portray the individu-

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in solving crimes and apprehending criminals, but not at all effective in preventing crime."). The picture is, however, a complex one, entertainment media often focusing on police ineffectiveness *when police obey the law* and effectiveness when they violate it. *See id.* at 42. Private investigators, also not so clearly bound by the constraints of law, are depicted as remarkably successful crime-solvers, and maverick but interested private citizens do at least as well. *See id.* at 42-43. Nevertheless, it is the police more than any other social institution that we expect to enforce the criminal law, and we therefore hold them accountable when lawlessness gets out of hand or goes unpunished. *See* SANJA KUTNJAK IVKOVIC, FALLEN BLUE KNIGHTS CONTROLLING POLICE CORRUPTION 3 (2005) ("We entrust police officers with the right to use coercive force when needed, and we expect them to enforce the law.").

[244] *See* SURETTE, *supra* note 243, at 42-43 (noting that the media portrays successful cops as "rebellious law enforcement insider[s] . . . willing to bend the law," violating civil liberties and ignoring due process).

[245] *See* WILSON, *supra* note 240, at 1 (using term, the "thin blue line").

[246] *See* Andrew E. Taslitz, *Respect and the Fourth Amendment,* 94 J. CRIM. L. & CRIMINOLOGY 15, 22, 24-26 & n.62 (2003) [hereinafter Taslitz, *Respect*].

[247] *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29-75 (1997); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action,* 66 LAW & CONTEMP. PROBS. 221, 239-48 (2003) [hereinafter Taslitz, *Racial Auditors*].

[248] *See* Taslitz, *Respect, supra* note 246, at 22, 24-26 & n.62.

al cop as constrained or enabled by the organization within which he works.[249] Officers must contend with departmental policies, a chain of command, and the pressures of their peers.[250] News coverage likewise emphasizes departmental responses to individual officers' alleged wrongdoing.[251] When racial minorities express fear of law enforcement, that fear is of "the police" as a whole as much as it is of beat officer Joe or Detective Kelly.[252] The mere sight of a blue uniform[253]—without any knowledge about the particular person inhabiting it—is enough to induce flight by some neighborhood residents or anxiety by a driver stopped for a traffic violation.[254] Individual police are therefore understood in significant part as mere agents of the organization for which they work. The "police" as an entity thus reflect a distinct culture—the culture of the *Men in Blue*.

b. *The Nature of the Police Personality*

Academics and police leadership themselves recognize the existence of a police culture. Anthony Bouza, former Chief of Police in Minneapolis, Minnesota, and a former commander of the Bronx, New York, police force explains: "Such a thing as the 'police character' exists because of the power of the institution to shape and condition its members."[255] The culture is one with its own set of rules and expectations distinct from those of the broader society. It is the culture of "us"—the brave warriors—against "them"—the rabble of the street.[256] Police, therefore, come to see themselves as "under siege" by the very neighborhood communities whom they are sworn to protect, as well as by the political establishment, their own internal affairs unit, and anyone else seen as the voice of the outsiders.[257] These outsiders are the enemies who are assaulting the insiders, the "brothers on the force."[258] Brothers band together, protecting their own and what the group as a whole stands for. Consequently, explains Bouza, in police culture,

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[249] *See generally* ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV 21-70 (2003) (analyzing major TV shows in which the police play an important role).

[250] *See* D. KEETLEY, LAW AND ORDER, IN PRIME-TIME LAW 33 (Robert Jarvis & Paul Joseph eds., 1998) ("Roles are dictated by process rather than personality," for "the real star of *Law and Order* is the criminal justice system itself . . . . Here process is king and woe to those naïve enough to think they have some control over its mysterious ways.").

[251] *See* WILSON, *supra* note 240, at 46-68 (collecting examples).

[252] *See, e.g.,* Taslitz, *Racial Auditors, supra* note 247, at 283; Taslitz, *Respect, supra* note 246, at 24-26 & n.62.

[253] *See* Taslitz, *Respect, supra* note 246, at 22, 24-26 & n.62.

[254] *See* Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment,* 70 FORDHAM L. REV. 2257, 2293-302 (2002) [hereinafter Taslitz, *Stories of Disrespect*] (summarizing law and social science); Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135 (2002) (arguing that racial minority flight from the police in so-called "high-crime areas" is often a form of protest against the tactics and attitudes of the police as an institution in these neighborhoods).

> The moral courage to stand up and disagree or to point out wrongdoing or to remonstrate when someone is committing a brutal or corrupt act has been systematically exorcised from the body. Nothing is rarer than dissidents publicly disagreeing with their colleagues about the codes of conduct, as is clearly evident from the cover-ups and studied silences accompanying serious acts of wrongdoing. Whistleblowers, reformers, and other troublemakers are "snitches and rat finks" and all ranks are to close against these menaces.[259]

This blue wall of silence serves to shield officers from outside influences and is firmly rooted in a commitment to group loyalty.[260] Loyalty is both horizontal—to one's peer officers[261]—and vertical—to superiors and to the department as a whole.[262] Group loyalty is necessary to effective police work, promoting, at its best, "acts of heroic daring and self-sacrifice," a sense of group cohesion, mission, and responsibility.[263] Loyalty enables officers to endure difficult times, adding meaning to their daily tasks by linking their fate to that of a greater whole and, at its best, also linking them to higher values, the sense of loyalty to the noblest of ideals.[264] Loyalty provides a sense of safety in the face of danger, a sense of belonging in a world of isolation, a sense of virtue in a daily stew of suspicion and corruption.[265]

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[255] ANTHONY V. BOUZA, POLICE UNBOUND: CORRUPTION, ABUSE AND HEROISM BY THE BOYS IN BLUE 21 (2001).

[256] *See* MICHAEL L. MIDDLETON, COP: A TRUE STORY 85 (rev. ed. 2000) ("It was 'us against them' . . . . *Them* not only encompassed the criminal element, but also included law-abiding citizens who wanted equality and justice.").

[257] *See id.* at 67-105 (exploring officers' "siege mentality").

[258] *See id.* at 85.

[259] BOUZA, *supra* note 255, at 22.

[260] *See* WILLIAMS, *supra* note 241, at 23-24 (discussing police insularity); STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 99 (2006) (recounting generally the nature of group loyalty).

[261] Professor Ivkovic explains:

What it means to be loyal to the group, however, turns on the group's own code of conduct. If that code is too detached from broader social codes of conduct, then group loyalty can degenerate into a commitment to behavior of a sort condemned by the broader society.[266] For the police, this too often means a culture in which "honorable" actions include those done to evade constitutional strictures.[267] In the Fourth Amendment

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> Police officers' sense of isolation, enhanced by their embrace of the "us versus them" mentality, generates perceptions that nobody understands them, that very few people can relate to their experience, that they cannot trust other community members, and that the only people they feel comfortable around are other police officers. As a consequence, an intense sense of solidarity, loyalty, and mutual trust develops among police officers. Indeed, at least 70% of the surveyed NYPD officers in the 1960s agreed: "The police department is really a large brotherhood in which each patrolman does his best to help all other patrolmen."

IVKOVIC, *supra* note 243, at 79.

[262] *See id.* at 85 ("Until yesterday, newly promoted sergeants were peers of the police officers they are now assigned to supervise; they have spent long hours on patrol with them, shared the same police subculture, and probably engaged in some form of rule-violating behavior."), 68-69 (explaining that, despite the rise of community policing, the paramilitary-style hierarchical bureaucracy predominates, one that assumes that "personnel have to be under strict command, obedient to supervisors, and in compliance with a voluminous sense of rules," an approach that may foster "a combat mentality and soldierlike perceptions . . . of duties"); STEPHEN M. PASSAMANECK, POLICE ETHICS AND THE JEWISH TRADITION 33-34 (2003) ("[P]olice can and do maintain a blue wall of silence to protect peers, or perhaps the department itself.").

[263] *See* PASSAMANECK, *supra* note 262, at 33.

[264] *See id.* at 34-35, 67-75.

[265] *See id.* at 40-41.

[266] *See* Taslitz, *Racial Auditors, supra* note 247, at 291-92.

[267] *See, e.g.*, SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNI-

area in particular, such evasion has been well-documented in the phenomenon of police "testilying"—a police willingness to perjure themselves at suppression hearings, creating a false impression of complying with constitutional rules.[268] For example, in so-called "dropsy" cases, virtually every police officer in a department might testify that a fleeing suspect conveniently "dropped" or abandoned drugs while in flight, thus losing any privacy protection under the Fourth Amendment.[269] The form but not the substance of the law is protected.

c. The Forces Shaping Police Personality

(i) Command Structure

Yet it would be a mistake to view these aspects of police culture as either monolithic or inevitable.[270] To the contrary, much of police life operates on a top-bottom model of command, one often increasingly similar in spirit to that of the military.[271] Superiors can act as role-models, enforcers of, and educators about, the group's rules and aspirations.[272] The words and actions of superiors help set the organization's tone, and both words and deeds must match.[273] Superiors who talk the language of constitutional ideals but look the other way when violations occur send the wrong message. Egregious vio-

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TY IN MODERN AMERICA 138-45 (1998) (arguing that only public protest, community struggle, practical experimentation, and community condemnation can help police adequately to internalize and obey broader community norms, including constitutional mandates).

[268] *See* Taslitz, *Stories of Disrespect, supra* note 254, at 2297.

[269] *See* Andrew E. Taslitz, *Slaves No More?: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U.L. REV. 709, 762 (1999) [hereinafter Taslitz, *Slaves No More*].

[270] *See* IVKOVIC, *supra* note 243, at 81 ("[T]here is no single, uniform police culture.").

[271] *See id.* at 68-69. *See generally* MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE (Peter B. Kraska ed., 2001) (collecting essays examining the increasing militarization of police departments).

[272] *See* IVKOVIC, *supra* note 243, at 70-73.

[273] *Id.* at 72 ("[P]olice chiefs who talk the talk but don't walk the walk, in addition to decreasing their own credibility, send the message that they are not sincere and that the efforts put into corruption control are hypocritical.").

lations that are inadequately punished breed a wink-and-a-nod tolerance of legally out-of-bounds behavior.[274] Rewards also help to set the tone. Are whistleblowers and dissenters praised for upright behavior or despised? Are those who isolate, insult, and threaten such dissenters severely and publicly sanctioned? Are bonuses awarded to the energetic but by-the-book cop or to the no-questions-asked swashbuckler? Are educational seminars, counselors, and legal advisors made available to help guide the cop who wants to do right, and are sanctions limited so that police are not over-deterred from doing their job properly by a fear of punishment for honest mistakes?[275]

(ii) Socialization

Socialization begins in the police academy itself, both in what is said in class and in private conversations.[276] When the rookie arrives on the job, his education continues in the precinct and on the street.[277] If he is paired with a right-thinking partner, finds an open management door to advice or for expressing concerns, and knows that his other fellow officers will "have his back," the rookie will himself become right-thinking. Loyalty to truly higher ideals will become integral to his personality and world view.[278]

(iii) Transparency

To avoid the challenge of conflicting loyalties, however, the group's code of honor must be congruent with that of the broader society.[279] That in turns requires systems for community involvement in, and oversight of, police policymaking and operations; community policing styles in which police closely interact with, rather than stand apart from, the neighborhoods they police; and systems for police accountability to the broader public but in a shared mission of public service.[280]

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[274] *See* BOUZA, *supra* note 255, at 22.

[275] *See, e.g.*, IVKOVIC, *supra* note 243, at 73-79, 83-87 (surveying internal police department rewards, punishments, and training). *See generally* C. FRED ALFORD, WHISTLEBLOWER: BROKEN LIVES AND ORGANIZATIONAL POWER (2001) (exploring the importance and difficulty of being an organizational whistleblower); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 405-12 (1999) (analyzing the dangers of over-deterrence in some proposed civil liability systems for police violations of constitutional rights).

[276] *See* PASSAMANECK, *supra* note 262, at 157-58.

[277] *See id.* at 158-59.

[278] *See id.* at 35, 70-73.

(iv) The Unique Character of Each Distinct Police Department, Not Merely of the Police as a Whole

Because the institutional structure and management practices of police departments, precincts, and units can so affect police culture, each police department, large or small, develops its own corporate personality, its own unique ethos.[281] One example of a particularly undesirable police ethos involved the New York Police Department's ("NYPD") Street Crimes Unit ("SCU").[282] Sergeant Noel Leader, in his testimony before the United States Commission on Civil Rights, explained that "Street Crime rides around the city. And they stop individuals with no complainant, no victim. They arbitrarily of their own initiation stop individuals . . . . Street Crime . . . stops male blacks and Latinos randomly in the street without any victims."[283] New York Attorney General Elliot Spitzer likewise noted that "it is the officer's own observation that initiates the stop and frisk."[284] Members of the SCU itself admitted, according to the Commission, to calling in phony complaints matching a suspect's description if the suspect indicated a willingness to complain about the stop's legality.[285]

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[279] *See* Taslitz, *Racial Auditors, supra* note 247, at 293.

[280] *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1163-78 (2000) (surveying techniques for improving police transparency and accountability to the community); Taslitz, *Slaves No More, supra* note 269, at 262-71 (describing the historical basis for transparency as a strategy for police regulation).

[281] *See supra* text accompanying notes 184-201.

[282] *See* UNITED STATES COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, *Report* (2000) [hereinafter COMM'N, POLICE IN NYC].

[283] *Id.* at 105 (quoting testimony of Sergeant Noel Leader).

[284] *Id.* (quoting New York State Attorney General Elliot Spitzer).

[285] *Id.* at 107.

Yet, if the SCU was the worst example of a police culture disdainful of constitutional rights, that culture flourished in, and was encouraged or tolerated by, the NYPD more generally, which, the United States Civil Rights Commission concluded, disproportionately targeted Hispanics and African-Americans for stop-and-frisk investigation—a conclusion based partly on the NYPD's data summaries, which the Commission believed to be incomplete and to vastly understate the problem, and upon citizen complaints.[286] Law professor and criminologist Bernard Harcourt, in a careful analysis of the data, found this disparate stop-and-frisk racial impact to be a direct result of the NYPD's commitment to "quality-of-life" policing targeting even the most minor of crimes for aggressive prosecution combined with subconscious stereotypes of black criminality and an internal management culture of denial of wrongdoing and obfuscation of community monitoring.[287]

The NYPD serves as one salient example, but many others could be named. The Los Angeles Police Department Ramparts scandal, the torture squads of Chicago's Area Two, racial profiling by the New Jersey State Police, and race-linked use of excessive force by the Cincinnati police are just a few of the most recent and infamous examples.[288] What does not make the papers as often, of course, are the many police departments with an ever-increasing commitment to the rule of law, a commitment sparked by enlightened leadership, scandal-revelation, public pressure, or some combination of these and other factors.[289] The bottom line is that each police department, like each corporation, has a unique ethos that inheres in its decisionmaking structure and socialization and management practices. In this sense, as with corporations, individual police departments can be said to have a mens rea accompanying actions reflecting a unique departmental character worthy of censure for wrongdoing.

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[286] *Id.* at 95-96.

[287] *See* BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 713-75 (2001).

[288] *See* Taslitz, *Racial Auditors, supra* note 247, at 239-48 (concerning racial profiling by the Maryland and Pennsylvania police and in Cincinnatti); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) (analyzing police brutality in Chicago's Area Two); IVKOVIC, *supra* note 243, at 69, 76-77, 85, 94, 137-38, 142 (analyzing Ramparts area scandal).

[289] *See generally* DAVID A. HARRIS, GOOD COPS (2005) [hereinafter HARRIS, GOOD COPS] (summarizing and analyzing these developments in certain police departments); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY (2005) (similar) [hereinafter WALKER, NEW WORLD].

B. The Expressive Function of the Police

Another prerequisite to the moral culpability of an organization is not only that it have a distinctive character but also that it be capable of, and be seen as capable of, sending messages about human worth.[290] On this score too, however, the police fit the bill.

Of course, the state's monopoly on the legitimate use of force is what enables the state to promote the social stability and cohesion necessary for the existence of civil society.[291] When the state uses force against any individual, therefore, its actions necessarily mark that individual as a threat to society.[292] If there is insufficient justification for targeting that person as a prior or current social threat—for example, if a police officer arrests someone without probable cause—that targeting in turn identifies that person as undeserving of the safeguards provided by requiring adequate reasons for invasive state action.[293] The individual becomes marked as outside the circle of equal citizens. If that individual's identity is linked to a broader social group, and if his arbitrary treatment is in turn seen as the result of his group membership, as happens with racial profiling, then harm to him is seen as harm to the group.[294]

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[290] *See supra* text accompanying notes 144-83.

[291] *See* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 1-6 (forthcoming NYU Press Oct. 1, 2006).

[292] *Id.* at 1-11.

[293] *See* Sherry Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence,* 96 COLUM. L. REV. 1456, 1486-1500 (1996).

[294] *See* Taslitz, *Respect, supra* note 246, at 45-51 (defining "respect" and explaining how unjustified searches and seizures can violate it).

The police are the primary institution accorded the responsibility to use force in everyday life on behalf of the state.[295] Police actions are, therefore, necessarily unsettling to those subjected to them and are frequently demeaning.[296] When those actions are perceived as racially biased, even if subconsciously so or even if resulting from mere institutional indifference rather than intentional malfeasance, entire racial groups feel the sting of insult.[297] The results can be explosive. Amnesty International's Executive Director, William F. Schulz, in the wake of a series of police scandals, issued this caution:

> Nothing threatens to rip this society apart racially any faster than disparity in treatment at the hands of the police. It has happened over and over before. Have we forgotten that nearly every one of the incidents of urban unrest in 1968 was touched off by arrests of blacks by white officers for minor offenses? Have we forgotten the experience of Los Angeles in 1992 following the acquittal of police in the Rodney King case, a conflagration that did more than $700 million worth of damage in the country? Are we unaware that St. Petersburg, Florida was the scene of a similar, if less costly, riot as recently as 1996 following the killing of a black motorist by a white officer? Do we really want to gamble that the United States has "put all this behind us?"[298]

Schulz, I am sure, did not mean to suggest that police misbehavior alone causes riots. But the message of racial insult sent by police abuses can be the spark that lights the fires of violent protest. The examples of this point are legion, recurring periodically in American history like clockwork. The most recent race riot happened in Cincinnati after a white officer shot and killed a young black male.[299]

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[295] *See* IVKOVIC, *supra* note 243, at 3.

[296] *See* Taslitz, *Respect, supra* note 246, at 15-41 (making and illustrating this point).

[297] *See id.* at 27-28.

[298] WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 158 (2002).

[299] *See* Taslitz, *Racial Auditors, supra* note 247, at 244-48 (discussing the Cincinnati riots); WILLIAMS, *supra* note 241, at 4-9 (engaging in a whirlwind tour of

More subtle communicative effects are evident daily, rather than the eye-catching ones of occasional riotous conflagration. Notably, Professors Yuen J. Huo and Tom R. Tyler, in an empirical study of minority attitudes toward the police in California, concluded that, compared to whites, African-Americans and Latinos reported lower levels of satisfaction in their interactions with legal authorities—especially the police—and consequently less willingness to comply with the directives of legal authorities.[300] These same minority groups also experienced less procedural fairness in dealing with authorities than did whites, and these perceptions of unfair treatment were more important than case outcomes in influencing the level of satisfaction with the police.[301] Furthermore, different minority groups and whites shared relatively similar conceptions of what constitutes procedural fairness: unbiased, respectful, individualized assessments of each person by the authorities.[302] Procedural fairness mattered most to those minorities most strongly identifying with American society, even where those same minorities shared a strong sense of ethnic identity.[303]

The result of such minority group distrust of the police is a reduced willingness to aid the police in combating crime.[304] That lessened police-community cooperation means that more criminals escape justice, and, with a reduced prospect of punishment, crime rises. But higher crime rates in minority communities breed the sense in those communities that police

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race "riots" (some call them "protests") sparked at least in part by perceptions of police injustices).

[300] YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY viii (Public Policy Institute of California ed., 2000).

[301] *Id.* at viii-ix.

[302] *Id.* at ix-x.

[303] *Id.*

[304] *See, e.g.,* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE COURTS 146-47 (2002) (explaining why African-Americans, especially if young, are more unwilling to accept police officer decisions than are whites). *See generally* DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) [hereinafter HARRIS, RACIAL PROFILING] (providing an extended defense of the proposition that minority group distrust of the police reduces minority cooperation with law enforcement, severely hampering its effectiveness).

simply do not care.[305] Thus, police come to be seen as either callous toward racial minorities or an active source of harassment of honest citizens, escalating the mutual sense of distrust and the cycle of crime and recrimination.[306] Once again, Amnesty International's George Schulz put the point well:

> A good percentage of successful police work depends on cooperation from the law-abiding elements in any community. If huge segments of the community are alienated from law enforcement authorities, mistrustful of them or frightened, that bodes ill for the willingness of those community members to extend a helping hand. Social commentator Dinesh D'Souza could never be accused of being a "bleeding heart liberal." His reason for opposing racial profiling is quite pragmatic: "Government-sponsored . . . discrimination has the cataclysmic social effect of polarizing African-Americans who play by the rules and still cannot avoid being discriminated against. Even law-abiding blacks become enemies of the system because they find themselves treated that way."[307]

Police departments, like corporations, are therefore entities, each having a distinct ethos, that are capable of sending demeaning messages about human worth via morally inappropriate action. The public, or at least important segments of it, perceive such action as deeply degrading, demanding a firm retributive response—a response that reaffirms the worth and dignity of individuals and of salient social groups.[308] These seem good reasons to condemn serious police misconduct in a way akin to that accomplished by the criminal law.[309]

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[305] *See* Taslitz, *Respect, supra* note 246, at 22, 26.

[306] *Id.* at 21-28; HARRIS, GOOD COPS, *supra* note 289.

[307] SCHULZ, *supra* note 298, at 159.

[308] On the need for those degraded and of society to wreak retribution on tormenters who cause public harms, *see generally* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 306 (2001).

[309] *See* Taslitz, *Stories of Disrespect, supra* note 254, at 2325.

C. Police Department Mens Rea

As with corporations, this analysis raises questions of proof: How can we prove what is a particular department's ethos and whether it has acted with the sort of institutional mens rea worthy of criminal responsibility and punishment? My answer is the same as that given in the corporate context: by looking to the department's internal decisionmaking processes—its policies, decisionmaking structure, flow chart and practices—to determine whether an individual officer's action reflects the "basic beliefs of the [department]."[310] Departmental responsibility does not, therefore, even require identifying any individual officer's wrongdoing but merely showing that some officer's reprehensible conduct was in fact encouraged by the corporate departmental ethos. The same concrete ways that Pam Bucy identified for establishing such encouragement in the corporate context can effectively be extended to the police context as well.

1. Hierarchy

Policing is necessarily hierarchical.[311] However, hierarchy can be structured to encourage or discourage the flow of information from the bottom up.[312] Moreover, an organizational hierarchy that allows the leadership to be too distant from the beat officers will mean a leadership unaware of—perhaps willfully blind to—the details of everyday policing.[313]

The isolation and ignorance of management will further be fostered if it is insulated from feedback from those most affected by police management decisions or inaction—the local community.[314] Broader political pressures will always be brought to bear on the police from powerful interest groups or where some scandal or explosive event erupts.[315] The best sorts of community policing reach out to the neighborhoods being policed, not only to build trust or open the flow of information about crime, but also to glean data about how the police themselves are performing.[316] Furthermore, community outreach is not limited to a public relations officer or a few beat officers; outreach includes police captains and even builds in regular opportunities for citywide police leadership to meet with various local communities.[317] Therefore, information must move locally from the bottom-up and then continue up the chain from the precincts to the Chief and his immediate aides.

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[310] FRENCH, *supra* note 154, at 41; *see supra* text accompanying notes 184-201.

[311] *See* HARRIS, GOOD COPS, *supra* note 289, at 131 (noting police departments adhere to a strict chain of command).

[312] *Id.* at 131-32 (explaining that, despite policing's hierarchical nature, most offices in practice do nearly all their work unsupervised and with only sporadic reporting to superiors).

[313] *Id.* at 127-30 (examining case study of a police manager improving performance by getting closer to his line officers and enhancing bottom-up communications), 134 (attacking departments that too readily pit command staff against rank-and-file officers).

2. Departmental Goals

If departmental goals are too narrow and include only what is rigidly measurable, the incentives throughout the chain of command will simply be to push up the numbers. For example, a focus on numbers of arrests will mean more arrests but not necessarily more *valid* arrests.[318] A focus solely on the numbers of guns kept off the streets will lead to widespread random, suspicionless searches like those undertaken by the New York City Street Crimes Unit, which did indeed collect many weapons.[319] In modern data-driven policing, enhancing the numbers of personnel assigned to a "hot-spot" neighborhood with the expressed goal of dramatically reducing crime at that location creates incentives to achieve that goal by any means necessary.[320]

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[314] *Id.* at 116-18 (explaining community feedback loops); WALKER, NEW WORLD, *supra* note 289 ("It is a basic principle of a democratic society that police should be answerable to the public.").

[315] *See* HARRIS, GOOD COPS, *supra* note 289, at 134-35 (illustrating political pressures).

[316] *Id.* at 116-18.

[317] *Id.* at 132-34; Taslitz, *Racial Auditors, supra* note 247, at 244-48 (illustrating a high-community-involvement experiment in Cincinnati).

[318] *See, e.g.*, Jennifer R. Wynn, *Can Zero Tolerance Last?, in* ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 107, 118-19 (Andrea McArdle & Tanya Erzen eds., 2003) (illustrating this point via an interview with an officer who admits making phony arrests of suspected drug dealers for minor offenses without probable cause, then refusing to show up in court to avoid perjuring himself, all done to raise his arrest statistics and make it harder for the suspected dealers to make as many sales).

[319] *Id.* at 113-14 (noting New York City's Street Crimes Unit made 45,000

Police should, of course, be accountable for their numbers, but they must also be accountable for their methods. Respecting constitutional limitations on how police go about their job must be embraced explicitly as as important a goal as up-ing the numbers of bad guys captured.[321] That may mean more emphasis on collecting qualitative as well as quantitative data—on how the police do their job, not merely on what job they do.[322] Expanding quantitative information can help in this goal as well. For example, efforts to increase data-collection on the race of those stopped and the reasons for the stop has both highlighted in several jurisdictions the existence of racial profiling and helped to discourage it.[323]

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stops in 1997 and 1998 but only 9500 resulted in arrests); Taslitz, *Racial Auditors, supra* note 247, at 256-57 (recounting evidence that SCU made many of these stops with no complainant or evidence of any crime in the first place, then calling in phony complaints when it seemed likely that a stoppee would report the illegality).

[320] *See* Wynn, *supra* note 318, at 119-20 (discussing "Compstat," the data-driven policing system in New York City), 108-112 (recounting financial and other incentives to maximize arrests regardless of their validity or wisdom), 117-18 (noting rise in civilian complaints against New York City police in the era of "zero tolerance" policing but the relative rarity of resulting police discipline).

[321] *See, e.g.*, IVKOVIC, *supra* note 243, at 140-41 (emphasizing importance of fostering a culture in which police are encouraged to report internal corruption); HARRIS, GOOD COPS, *supra* note 289, at 156-58 (noting importance of the police defining their mission as service to the public—not as "catch[ing] bad guys"—a mission that includes upholding the law *and* the Constitution).

[322] *See* HARRIS, GOOD COPS, *supra* note 289, at 116-18 (stressing collecting community data on how its members perceive being treated by the police); WALKER, NEW WORLD, *supra* note 289, at 100-34 (summarizing "early intervention systems" prompting investigation of how particular officers do their job and seeking, where appropriate, to correct it); Taslitz, *Racial Auditors, supra* note 247, at 230-38 (explaining what sorts of data, including qualitative data, independent racial auditors of the police collect, how, and why).

[323] *See* HARRIS, RACIAL PROFILING, *supra* note 304.

3. Educating Officers

Police officers need a thorough grounding not only in Fourth Amendment and related constitutional mandates, but also in their importance and their consistency with effective law enforcement.[324] Police training at the academy and beyond must emphasize how compliance with reasonable suspicion, probable cause, and warrant requirements can build community trust, thus enhancing community candor and assistance.[325] Such a partnership makes it easier to fight crime *and* to avoid error—to reduce the risk of convicting the innocent from getting only one side of a story.[326]

But much police unconstitutional behavior, such as racial profiling, is caused by unconscious and institutional forces rather than police ill will.[327] Much social science research demonstrates that alerting persons to unconscious processes alone does not generally change behavior.[328] But explaining to someone how and why these processes work and the reasons why we resist acknowledging their influence and avoid changing our actions does succeed nicely in improving poor behavior.[329] Role-plays and active learning experiences, and guest lectures by those hurt by police misconduct, are also likely to be more effective than sole reliance on recitations of the law or other passive learning techniques.[330]

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[324] Professor Harris notes that almost all new law enforcement officers in the United States receive many weeks of formal training, followed by field training, that includes recitation of constitutional limits on police power. *See* HARRIS, GOOD COPS, *supra* note 289, at 169. But, he notes, the completeness and quality of the legal training is woefully inadequate:

> But it is unlikely that most police officer trainees will receive any training in civil or human rights, the flashpoint for so many of the struggles in our society between police officers and the public, particularly minority groups. Those departments that do cover these topics in their training typically spend little time on them. Moreover, whatever training recruits get in civil rights or constitutional law is usually taught not to help officers understand how to protect these important American values, but as part of "avoiding liability"—how to steer clear of lawsuits for violating the rights of the public. Little effort is made in such classes to show how a genuine regard for human and civil rights properly sets the standards for law enforcement and police conduct.

Id. at 169.

[325] *See* HARRIS, RACIAL PROFILING, *supra* note 304.

[326] *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision,* 49 HOWARD L. J. 475, 481-82 (2006) (explaining the cognitive processes that often lead police and prosecutors to focus too early on one subject, a "tunnel vision" that may distract them from the real wrongdoer).

[327] *See generally,* Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006) (exploring some of these unconscious processes).

[328] *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 133

Education must, however, not be limited to the classroom. The learning process must be constant. Policy bulletins, the modeling of behavior by superiors, and clear rules to guide rookies are among the many ways to build a culture of compliance.[331] It is the constant *effort* to do better that matters, as one expert on police ethics, T.E. Wren, has said:

> What is needed, then, is an approach to police formation that instills a passionate commitment to the law into the most intimate parts of a policeman's personality structure and self interpretation and simultaneously incorporates this attitude with the tacit norms and expectations that bind the police fraternity together. If this could somehow be done, then a policeman who himself [is] confronted by misconduct and corruption by his comrades would be perceived as having been betrayed by them and not, as it usually seems, the other way around. In this best of all police sub-worlds, the revised idea of a fellow officer being "all right" would include his having qualities like the strength to resist corruption . . . and above all the confidence to chide another for tarnishing his badge.[332]

(1999).

[329] *Id.* at 133.

[330] Similar active-learning approaches seem to be having some success in changing attitudes and behavior in other areas governed by the law, for example, in reducing sexual harassment. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession,* 9 GEO. J. LEGAL ETHICS 781, 834-35 (1996).

[331] *See* HARRIS, GOOD COPS, *supra* note 289, at 84-85 (emphasizing importance of a pervasive police culture of accountability) 90-103, 116-22 (surveying accountability techniques), 135-53 (illustrating enlightened leaders using these techniques), 154-71 (articulating and illustrating the elements of a healthy police culture).

[332] T.E. Wren, *Whistleblowing and Fidelity to Friends, in* THE ETHICS OF PO-

4. Punishing the Current Offense

No system designed to show an entity's due diligence in preventing harm should meet that burden without an effective internal means for sanctioning wrongdoers. Current internal sanctioning mechanisms for individual officers' Fourth Amendment violations have been shown to be inadequate.[333] They usually do not include economic sanctions on the wayward officer; few are reprimanded anyway, especially given minimal, if any, efforts to ferret out the misbehavior,[334] and, as law professor Christopher Slobogin has put it, "police superiors have a hard time punishing hard-working cops for mistakes made at the margin, at least where there is no external pressure to do so."[335]

A wide variety of better internal reprimand procedures can easily be envisioned. Independence of the investigators and decisionmakers would be important. A department might, for example, create an administrative mechanism in which departmental outsiders—perhaps rotating three-person tribunals of volunteer lawyers—consider complaints.[336] A schedule of liquidated penalties might be applied, based both upon officer salary and the egregiousness of the violation.[337] To avoid over-deterrence,[338] initially only officers recklessly, knowingly,

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LICING 37 (J. Kleining ed., 1996).

[333] *See* Slobogin, *supra* note 275.

[334] *See id.* at 374-79.

[335] *Id.* at 384.

[336] *See id.* at 386-87 (suggesting analogous proposals); Robert P. Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal,* 4 TEX. TECH. L. REV. 317 (1973) (proposing a "fourth branch" ombudsman to enforce constitutional restrictions on law enforcement).

[337] *See* Slobogin, *supra* note 275, at 386-90 (recommending a similar form of liquidated damages).

[338] See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640-42 (1982) (arguing that police salaries will always necessarily fail to compensate adequately, so imposing the full social costs on an officer of his mistakes will severely over-deter; Posner thus favors only monetary entity liability for the police department); PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 98 (1983) (arguing damages remedy will "chill . . . vigorous decisionmaking").

or purposely violating the Constitution should pay a financial penalty.[339] Negligent officers facing a first offense might be required to participate in remedial training programs and receive a warning. But repeated violations—even if each were merely negligent—should thereafter result in a rising penalty scale, creating an incentive to learn and obey the law.[340]

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[339] *See* Slobogin, *supra* note 275, at 410-11. Slobogin argues that officers who inadvertently violate the Constitution might resent a financial penalty as unfair, though he seems to suggest both that the result may be under-deterrence *or* over-deterrence. *See id.* at 373-80, 405-12, 416-18. The police department, as an organizational entity, is both unlikely to suffer resentment effects for negligent conduct and is particularly well-suited to achieve organization-wide change and improved training, especially for problem officers. *See id.* at 399-400. Therefore, Slobogin would not punish individual officers acting in good faith but would instead allow civil penalties on the department as a whole for individual officers' well-meaning but negligent conduct, or even permit strict liability as to the department, though a "strict liability" with a "good faith" out that sounds to me more like negligence liability. *See id.* at 399-400, 417. I do not address civil case police entity liability here for the simple reason that I think that expanding such liability is a political non-starter. For similar political reasons, I doubt that permitting injured citizens to pursue ordinary tort damages against individual officers is a viable option either. Of course, I recognize that there are considerable political obstacles to my own proposals. But I think it more likely that state or local legislatures might permit a system of liquidated damages paid by officers to the state—in effect, docking offending officers' pay without hurting the state's overall budgetary health—than the sort of regime Slobogin proposes. (An alternative approach—paying part or all liquidated damages to citizens who never faced prosecution, thus never having the benefit of the exclusionary rule—might also be politically marketable as providing a relatively easy administrative way of compensating "innocent" victims of improper searches and seizures. *See infra* text accompanying notes 342-45 (proposing such an alternative). Perhaps police chiefs could impose analogous pay-docking procedures without legislation if the chiefs are able to stand up to powerful police unions. My proposal as to punishing an officer's current offense is thus inspired by, and closely tracks aspects of, Slobogin's suggestion while also substantially differing from it, especially because Slobogin sees his regime as entirely replacing the exclusionary rule. To avoid an individual officer's perception of unfairness, however, I agree that his negligence should not result in immediate financial penalties. But he would face re-training and a warning, thus both discouraging re-offending and reducing perceived unfairness if he does re-offend. Because financial penalties are only one non-determinative factor in my proposed good-faith analysis, departments, not just individual officers, still have an incentive to seek organizational reform to avoid the sting of the exclusionary remedy. They cannot simply pay a fine as the "price" for admitting evidence. *See* Davies, *supra* note 10 (explaining the difference between a "price" and a "sanction" and the distinction's significance under the exclusionary rule).

[340] *Cf.* Slobogin, *supra* note 275, at 416-17 (discussing punitive and other dam-

There is strong reason to believe, contrary to claims made elsewhere, that such a regime would not over-deter.[341] Instead, both individual officers and the department as a whole would have an incentive to search for more proactive methods of preventing crime so that fewer searches are needed[342] and to turn to judges for warrants more often, the warrant serving as a sort of "advisory opinion" giving officers some comfort that their actions are legal.[343] Professional pride, other reward structures encouraging aggressive crime-control efforts, and political pressures would also likely prod, there is good reason to believe, officers into doing their jobs via constitutional means rather than abandoning doing them at all.[344]

To ensure that cases are brought before these tribunals in the first place, a mandatory referral should be made whenever either: (a) a suppression motion is granted or (b) a constitutional violation is found but suppression denied pursuant to the exclusionary rule's good faith exception. Moreover, liquidated penalties could be turned over as damages paid to any citizen filing a complaint of ill-treatment, later found by the tribunal to be valid, but where no prosecution resulted or where one was readily nolle-prossed by the prosecutor's office.[345] This

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ages options in certain cases, an idea analogous to that of a rising individual officer penalty scale).

[341] *See id.* at 394-417 (defending an analogous regime against claims of over-deterrence and under-deterrence based on the teachings of cognitive psychology).

[342] *See id.* at 413-16 (summarizing data suggesting that "problem-oriented policing" is as effective as aggressive search and seizure practices in combating crime in "hot spot" neighborhoods); Mark Moore, *Problem-Solving and Community Policing, in* MODERN POLICING 130 (Michael Tonry & Norval Morris eds., 1992) (collecting data on problem-solving impacts); LAWRENCE SHERMAN ET AL., THE KANSAS CITY GUN EXPERIMENT 1-3 (1995) (reporting results of aggressive patrol and seizure tactics); Lawrence W. Sherman, *Police and Crime Control, in* MODERN POLICING, *supra,* at 157, 213 (similar).

[343] *See* Slobogin, *supra* note 275, at 409-10.

[344] *See id.* at 407-10. Yet, without some financial penalty on individual officers, under-deterrence is likely. *See id.* at 373-80 (using cognitive theory to explain why the exclusionary rule devoid of serious individual officer financial penalties will under-deter). My task here is to gauge the scope of the good faith exception to the exclusionary rule, not to defend the rule itself, so I do not here respond to Slobogin's broader goal—that the exclusionary rule be eliminated. *See id.* at 364-68.

[345] Citizen payments smack, however, of tort damages remedies, raising poten-

would create incentives for citizens ultimately not facing prosecution to have their complaints heard. Such a regime—though only one possible way to do things—would raise the likelihood that the good faith exception will not undermine the exclusionary rule's deterrent value. It would, on the other hand, in a real sense demonstrate the department's good faith commitment to the rule of law.[346]

5. Monitoring Compliance with Legal Requirements

I, Erik Luna, and others have written about this point extensively elsewhere.[347] The central theme of a sound monitoring system is that it must be aggressive in uncovering violations rather than simply reacting to them, and it must "fetishize" transparency.[348] Active systems require both internal and external audits specifically aimed at identifying constitutional violations—audits distinct from those done for other purposes.[349] Transparency requires involving outsiders—especially lay representatives of the neighborhood—to have an effective voice in police policymaking and in review of individual cases.[350] One fascinating experiment in this area,

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tial constitutional objections, including violation of the Seventh Amendment right to jury trial in civil cases, a problem likely avoided by adhering to a more administrative-style model conceiving of the payments as pure penalties turned over to the state. *See id.* at 421-23; *see also supra* note 315 (also noting an administrative scheme might be more politically marketable). The choice between making payments to the citizen (creating incentives for them to report claims) versus to the broader state treasury (thus raising no state-wide budgetary issues) is thus a close one. What matters for the purposes of establishing good faith, however, is that the existence of *some* system of financial penalties is an important indicator of that faith.

[346] *Cf.* Slobogin, *supra* note 275, at 418 (arguing, interestingly, and though only in a paragraph, that a department, under the entity liability the author proposes, might reduce or eliminate its financial liability in some cases if, "[a]nalogous to the framework for fining corporations under the federal sentencing guidelines, . . . it could show that it cooperated with the investigation into the police action and that it made a meaningful post-offense response to the culprit").

[347] *See generally* Luna, *supra* note 280; Taslitz, *Racial Auditors, supra* note 247.

[348] *See supra* note 347.

[349] *See generally* Taslitz, *Racial Auditors, supra* note 247; WALKER, NEW WORLD, *supra* note 289, at 135-70.

[350] *See* Taslitz, *Racial Auditors, supra* note 247, at 221-64; *see generally* Luna,

albeit one begun under judicial auspices, is under way in Cincinnati, where joint groups of various strata of the local citizenry worked together with street officers and police managers to craft a mutually agreeable system for preventing police abuses and for continuing to be actively involved in monitoring.[351] The resulting publicity accompanying such efforts further promotes transparency.[352]

6. Reacting to Past Violations

The point here is that it is necessary but not sufficient to make a good faith claim that the violator in the case now before the court has been or shortly will be punished. The department must also show that it has consistently sanctioned past violators and, much like the National Transportation Safety Board would do in airplane crash cases, has thoroughly investigated the causes of any mistakes made and attempted to correct them.[353]

7. Reward Structure

This last consideration would focus on whether bonuses, raises, commendations, and awards are given to effective officers who comply with constitutional mandates and denied to those who do not.[354] Similarly, the department must provide the counseling and training opportunities to enable all officers to compete for these benefits and to allow even wayward officers to aspire to the carrot and not merely fear the stick.[355]

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supra note 280.

[351] *See* Taslitz, *Racial Auditors, supra* note 247, at 244-48.

[352] *See id.* at 258-64 (noting auditors' symbiotic relationship with the media).

[353] *Cf.* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 102-03 (Sept.-Oct. 2002) (analogizing to National Transportation Safety Board procedures to create a new board to investigate innocence claims and associated systemic failures).

[354] *See* HARRIS, GOOD COPS, *supra* note 289 at 155 (concerning incentive and reward structures).

[355] *See id.* at 155, 169-71 (reforming officer training).

D. Tentative Conclusions

1. The Good Faith Exception Was Not A Good Idea

I should not be understood by my remarks as endorsing any version of the good faith exception to the exclusionary rule. Although my goal here is not to develop any full-blown challenge to the exception but rather to improve its operation, there are good reasons to doubt its wisdom that are worth mentioning as a cautious note. Notably, it never truly makes the victims—the individual searched and society—entirely whole because it does not nullify the search, rendering it as if it had never been.[356] To the contrary, it places the judicial imprimatur on a violation of constitutional rights.[357] What courts or anyone *does* speaks more loudly than what they *say*.[358] Although a court may bemoan a breach of Fourth Amendment rules, failing to provide any effective remedy for such a breach demonstrates disrespect for the law.

Furthermore, I tend to agree with Justices Stevens and Burger that the police as an entity are not the only culpable parties when the constitutional law of search and seizure is violated.[359] Such a breach reflects a failure to foster a constitutional culture in which rights are fully respected, and the denial of a remedy for breach by society's representatives is a de facto endorsement of the wrong.[360] Constitutional principles serve as a way of bonding a diverse nation into the *American* people.[361] The nullification of the wrong represented by application of the exclusionary rule is a re-affirmation of American bonding and unity behind our highest moral principles.

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[356] *See supra* text accompanying notes 72-73. I admit, however, to some ambivalence here, given Professor Davies thought-provoking argument that the good faith exception is necessary to the exclusionary rule's being viewed as a moral "sanction" rather than the mere "price" of doing business. *See* Davies, *supra* note 10.

[357] *See supra* text accompanying notes 73-75.

[358] Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 220-21 (2005) (concerning ways in which changes in law change public attitudes).

[359] *See supra* text accompanying notes 78-79.

[360] *See supra* text accompanying notes 78-79.

[361] *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8, at 55-61.

2. The Exception as Practiced Is Vacuous

But, if there is to be a good faith exception, the Court has created a ramshackle doctrinal structure. Simple tort negligence is definitionally present whenever the police have violated the Fourth Amendment by engaging in an "unreasonable" search and seizure.[362] Yet, in *Leon,* the Court made clear that, when police are relying on a warrant, such negligence is insufficient to show bad faith.[363] Instead, something more is required, something demonstrating greater culpability by the police as an institution—something akin to at least the gross negligence involved in imposing entity liability in criminal cases.[364] But the Court does not require any serious inquiry into whether such gross negligence *by the entity* has occurred. It does not explore internal police departmental policies, structure, and practices to assess departmental culpability.[365] Such an inquiry would have its costs, but they are not insuperable ones, as the experience in Florida of requiring depositions in felony cases—originally challenged as likely to promote explosive costs but instead decreasing long-term costs—has revealed.[366] More importantly, however, such inquiries, even if costly, are mandated if entity culpability is truly in question. Instead, however, the Court relies on a subjective and rough instinctive judicial reaction to whether the police have gone too far. The Court overtly justifies its approach by an empirically unproven cost-benefit analysis that assumes no reduction in deterrence by recognizing a good faith exception.[367] But its implicit moral analysis suggests that it would not change direction were empirical evidence to point the other way because it sees application of the exclusionary rule as a public sanction condemning extreme negligence or recklessness showing an indifference to human worth and constitutional values akin to that in criminal cases.[368] But such a vision is morally vacuous absent adequate investigation into, and proof of, such culpability, as this article recommends.

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[362] *See supra* text accompanying notes 35-39.

[363] *See supra* note 9.

[364] *See supra* text accompanying notes 36-80.

[365] *See supra* text accompanying notes 19-143 (analyzing the Court's good faith exception cases).

[366] *See* Taslitz, *Slaves No More, supra* note 269, at 768-69 n.378, 776-79 (discussing the Florida experience).

[367] *See supra* text accompanying notes 19-35.

3. Criminal Sanctions Are Not a Feasible Alternative

Criminal sanctions for police departments are not a practical substitute for such investigation. Such sanctions could truly bleed treasuries dry and severely over-deter. They would divert enormous psychological and material resources from crime control.[369] If successful, such prosecutions would mark entire police departments as criminals, either breeding disrespect for the law or blurring the line between law enforcement and criminality.[370] Proof would also be very time-consuming and difficult given the beyond a reasonable doubt standard and the other procedural protections for defendants at criminal trials.[371] Yet, in the Court's vision of the exclusionary rule's function, some sort of serious condemnation of entity culpability is nevertheless required.[372] A properly-constructed good faith exception to the exclusionary rule can do just that.

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[368] *See supra* text accompanying notes 36-71. Perhaps more accurately, the Court may be conflicted about whether it sees the good faith exception as involving release from an economic "price" or a "moral sanction." *Cf.* Davies, *supra* note 10.

[369] Critics who worry that civil damages remedies imposed on individual officers would over-deter would surely be aghast at the idea of individual officer criminal liability. *See, e.g.,* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule,* 20 HARV. J.L. & PUB. POL'Y 443, 446 (1997).

[370] *See* Taslitz, *Civil Society*, *supra* note 10 (discussing communicative political impact of criminal sanctions).

[371] *See* ELLEN S. PODGOR, ET. AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 199-219, 240-53 (2005) (discussing beyond a reasonable doubt and other procedural protections for defendants in criminal trials).

[372] *See supra* text accompanying notes 36-71.

4. The Court's Rationale for Not Extending the Exception to Warrantless Searches is Fuzzy

The Court's current version of the good faith exception also raises another puzzle. If the absence of departmental culpability is the primary justification for the exception, then why not apply it to warrantless searches?[373] One response is that the Court may take the view that, though warrantless searches and seizures are frequently necessary, they can never be set up as the politically moral ideal.[374] There is always some taint of culpability without prior judicial sanction when a constitutional violation occurs, even if it involved but ordinary negligence on the officer's or the entity's part.[375] In any event, extending the good faith exception to warrantless searches and seizures would make suppression the exception rather than the rule when a constitutional violation is found, a step the Court has apparently thus far been unwilling to take. Furthermore, taking such a step makes sense only if you believe that deterrence is the sole purpose of the exclusionary rule and will not be undermined by the good faith exception's expansion to warrantless searches—two beliefs I do not share.[376]

5. The Court Should Have the Courage of Its Convictions

The current doctrine is a confused and half-hearted effort. If the Court is truly to have the courage of its convictions, it should grant the good faith shield only when the prosecutor has proven the absence of any departmental-level culpability via the factors addressing such culpability that I have outlined here. Otherwise, the Court should recognize the inadequacy of its current approach to good faith by chucking the doctrine entirely. One way to come close to doing this *sub judice* without openly jettisoning a long-standing doctrine is to find "bad faith" where there is simple tort negligence. Arguably, looked at in isolation, the recent *Groh* case did this, denying the good faith shield where the police had made a truly technical error.[377] I doubt, however, that this case marks a radical retrenchment of the good faith exception, though it may reveal a sense that the Court is at least troubled by its earlier precedent's implications.[378] If the good faith exception is to exist, the entity-liability model posited here and nascent in *Leon* would do more to deter constitutional violations and promote respect for the police and the law than does the current state of confusion.

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[373] *See* TASLITZ & PARIS, *supra* note 1, at 547 (noting good faith exception applies only to searches based upon a warrant).

[374] *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8, at 17-44 (reviewing historical grounds for distrusting both warrantless searches and those based on insufficiently particularized warrants).

[375] *See* Taslitz, *Civil Society*, *supra* note 10, at 329-30 (on a character of indifference toward harm being what justifies criminal liability for gross negligence); *supra* text accompanying notes 144-50 (similar).

[376] *See supra* text accompanying notes 355-58 (summarizing briefly the reasons for my opposition to narrowing of the exclusionary remedy).

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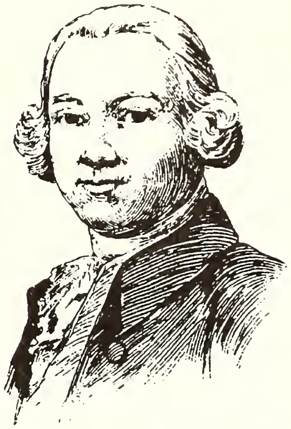
[377] *See supra* text accompanying notes 100-12.

[378] *See supra* text accompanying notes 100-12 (discussing my reasons for this conclusion).

The James Otis Lectures



ANNUAL LECTURE SERIES ON SEARCH AND SEIZURE PRINCIPLES

This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants that permitted the authorities to search anywhere they pleased for any reason–or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as "'against the fundamental principles of law.'"[1] He asserted, among other things: "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."[2]

John Adams, who witnessed Otis's impassioned oration, afterward declared: "Every man of an [immense] crowded audience appeared to me to go away, as I did, ready to take arms against [Writs] of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[3]

Although Otis may have lost his case before the Massachusetts Superior Court in Boston's Old Town Hall that day, he gained a place in history. In that case, "the American tradition of constitutional hostility to general powers of search first found articulate expression."[4] It was Adams, so inspired by Otis's words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America's Fourth Amendment advocates.

Thomas K. Clancy[*]

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[1] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 36-37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[2] *Id.* at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 142).

[3] 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 107.

[4] M.H. SMITH, THE WRITS OF ASSISTANCE CASE 7 (1978).

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THE DETENTION OF MATERIAL WITNESSES AND THE FOURTH AMENDMENT*

*Joseph G. Cook***

INTRODUCTION

In June 2005, Human Rights Watch and the American Civil Liberties Union published a lengthy report entitled *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11.*[1] The report began:

> Since the attacks on September 11, 2001, at least seventy men living in the United States–all Muslim but one–have been thrust into a Kafkaesque world of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links. They have found themselves not at Guantánamo Bay or Abu Ghraib but in America's own federal prison system, victims of the misuse of the federal material witness law in the U.S. government's fight against terrorism.[2]

The law referred to is the federal material witness statute,[3] which authorizes the arrest and detention of an individu-

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[1] Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11 (2005), *available at* http://hrw.org/reports/2005/us0605/us0605.pdf [hereinafter WITNESS TO ABUSE].

[2] *Id.* at 1.

[3] 18 U.S.C. § 3144 (2000).

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it

al whose testimony is material in a criminal proceeding.[4] The statute is not a part of the U.S. Patriot Act, and that fact has probably prevented it from garnering too much attention. Quite to the contrary, it has been around, with but minor changes, for over two hundred years, first appearing in the Judiciary Act of 1789.[5] Its ostensible purpose is to assure the availability of testimony of witnesses who might otherwise elude a subpoena.

The unique feature of this statute is that it authorizes the arrest and detention of individuals who have not and are not even suspected of committing any crime. And yet, the statute provides that once arrested, they are to be treated "in accordance with the provisions of section 3142."[6] Section 3142 is entitled, "Release or detention of a defendant pending trial."[7] If we incorporate the standards for the release of defendants pending trial into the material witness statute, then it would seem to follow that a material witness should be detained only so long as may be necessary to set bail or other conditions. If the witness is unable to satisfy the conditions set for release, then a deposition should be taken forthwith, followed by the

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> may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such a witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Id.

[4] Material witness statutes are also found in almost all states. They are, in the main, comparable to the federal statute, though they vary in detail. In some instances, detention is authorized only so long as may be necessary to take a deposition. *See, e.g.*, COLO. CONST. art II, § 17; MONT. CONST. art. II, § 23; S.D. CODIFIED LAW § 23A-12-1 (1979); N.D. R. CRIM. P. 15 (detention not to exceed six hours). Some place strict limits on the length of the detention. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4803 (1978) (maximum of three days); FLA. STAT. ANN. § 902.17 (West 2001) (same); MD. CODE ANN., CTS. & JUD. PROC. § 9-203 (West 1974) (seven days unless a judge authorizes additional period).

[5] Ch. 20, §§ 30, 33, 1 Stat. 73, 88-91.

[6] 18 U.S.C. § 3144 (2000).

[7] 18 U.S.C. § 3142 (2000).

release.

In reality, however, today the law is used primarily for a different purpose, to wit: "to secure the indefinite incarceration of those [the Department of Justice] has wanted to investigate as possible terrorist suspects."[8] Certainly it is open to question whether such use is even authorized by the statute. In any case, the use of the law has been accompanied by a broad range of constitutional abuses which have been cataloged by courts and commentators.

What has been neglected is the underlying assumption of the law, and that will be the focus of my remarks. That is, is the very act of arresting and detaining individuals who are not themselves charged with any criminal activity irreconcilable with the protection of the Fourth Amendment?

One might think that, given a two hundred year window of opportunity, questions regarding the constitutionality of the statute would have been fully explored and its validity beyond peradventure. This seems to be a common assumption. Upon close scrutiny, however, the assumption does not appear to be warranted.

The constitutionality of the practice has never been addressed by the Supreme Court, though many courts and commentators appear to think that it has. No lower court has ever elected to grapple with the question, or perhaps no litigants have ever forced any to do so.[9] If we subject the practice of detaining material witnesses to a traditional Fourth Amendment analysis, there is little to be found in the way of supporting precedent. And if, being at a loss for viable precedent, we resort to a device occasionally used by the Supreme Court in cases of first impression—that is, determining those investigative practices recognized by the common law at the time of the American Revolution and labeling them reasonable by virtue of tradition—that too will fail to vindicate the law.

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[8] WITNESS TO ABUSE, *supra* note 1, at 1.

[9] I am not suggesting that no court has ever considered the implications of the Fourth Amendment in the interpretation or application of the statute. But the question has always been concerned with the details. For example, what probable cause showing is required to make an arrest under the statute? Can such an arrest be made without prior judicial authorization? Never, so far as I have been able to determine, has the question been asked, is the practice of detaining material witnesses per se unconstitutional.

One is thus led to the anomalous conclusion that the statute is assumed to be constitutional because it has always been so assumed. This brings to mind Professor Felix S. Cohen's observation in 1935 in a landmark article in the *Columbia Law Review*[10] that if a court says something three times, it begins to believe that it is true.[11]

Of course, today many people do not want to hear an argument that if accepted would frustrate the efforts to counteract terrorism. But here, if anywhere, at the National Center for Justice and the Rule of Law, the felt necessities of the times cannot permit the end to justify the means.

There is a memorable scene in Robert Bolt's play, *A Man for All Seasons*, in which Sir Thomas More, Lord Chancellor, is visited by Richard Rich, and the two engage in an exchange that foreshadows More's eventual downfall.[12] When Rich departs, More's friend, William Roper, entreats him to arrest Rich.[13] More responds that Rich has broken no law, and that even if Rich were the Devil himself, he would not be subject to arrest until he broke the law.[14] The dialogue continues:

> ROPER: So now you'd give the Devil benefit of law!

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[10] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[11] *Id.* at 820. Cohen quoted "The Hunting of the Snark, Fit the First" by Lewis Carroll:

> "Just the place for a Snark!" the Bellman cried,
> As he landed his crew with care;
> Supporting each man on the top of the tide
> By a finger entwined in his hair.
> "Just the place for a Snark! I have said it twice:
> That alone should encourage the crew.
> "Just the place for a Snark! I have said it thrice:
> What I tell you three times is true."

Id. at 820 n.31.

[12] ROBERT BOLT, A MAN FOR ALL SEASONS 62-65 (Random House 1962).

[13] *Id.* at 65.

[14] *Id.* at 65-66.

> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
> ROPER: I'd cut down every law in England to do that!
> MORE: . . . Oh? . . . And when the last law was down, and the Devil turned round on you–where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast–man's laws, not God's–and if you cut them down–and you're just the man to do it–d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[15]

To put the matter before us in the starkest terms, the material witness statute empowers the government to arrest and detain individuals who have not broken the law. The question I address today is whether such a practice should be constitutionally sustained.

THE CASE OF OSAMA AWADALLAH

I turn then to a story for our times.

On the afternoon of September 11, 2001, only hours after the terrorist attacks in New York and Washington, FBI agents located a car in the Dulles Airport parking lot owned by Nawaf Al-Hazmi.[16] Al-Hazmi was believed to have been among the terrorists who crashed Flight 77 into the Pentagon.[17] Inside the car was a scrap of paper upon which had been written "Osama" and a seven digit phone number.[18] The phone number was identified with an address in San Diego and a former resident at that address went by the name Osama Awadallah.[19] Awadallah had not lived there for eighteen months.[20]

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[15] *Id.* at 66.

[16] United States v. Awadallah, (*Awadallah II*), 349 F.3d 42, 45 (2d Cir. 2003) *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

So far as the case indicates, this piece of paper is the only connection between Awadallah and the events under investigation. Moreover, so far as the case indicates, at no time thereafter did authorities garner evidence sufficient to charge or even suspect Awadallah of involvement in any terrorist activity. In fact, no criminal charges were ever brought. Awadallah was detained solely as a material witness.

Nine days later, a group of eight federal agents gathered in the vicinity of Awadallah's San Diego apartment.[21] They received no response at the door, but shortly thereafter an individual recognized by the agents as Awadallah's roommate arrived.[22] The agents accompanied him into the apartment and questioned him for two to three hours.[23]

Meanwhile, Awadallah, who was a student at Grossmont College, was attending a course in "English as a Second Language."[24] Upon his return to the apartment, he was met by seven or eight agents in the parking lot.[25] Agent Rielly told him that they needed to talk for about thirty minutes at the FBI's office and that he could follow them there in his own car.[26] Awadallah asked why the interview could not take place in his apartment.[27] After conferring with another agent, Rielly changed his mind and told Awadallah to leave his car in the parking lot and that he would be driven to the FBI office.[28]

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[21] United States v. Awadallah, (*Awadallah I*), 202 F. Supp. 2d 82, 87 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[22] *Id.*

[23] *Id.* at 87-88.

[24] *Id.* at 88.

[25] *Id.* Later, Awadallah claimed that there were fifteen to twenty agents in the parking lot, but this testimony was not credited by the district court. *Id.* at 88 n.9.

[26] *Id.* at 88.

[27] *Id.*

[28] *Id.* Agent Rielly testified that the change in plans was made "for safety reasons." *Id.* at 88-89 n.11. He opined that Awadallah "might, on the way to the field office, try to cause an accident, try to harm the agents in some way." *Id.* (citation omitted). No reason was given for considering Awadallah to be dangerous. Indeed, Agent Teixeira testified, "[W]e did not consider him a suspect of

Before they left, Agent Rielly induced Awadallah to sign a consent form agreeing to a search of his apartment and car, noting that if he refused to consent, they would obtain a search warrant and "tear up the home."[29]

At the FBI office, Awadallah was interrogated for six hours.[30] In the end, the agents told him that "he had been cooperative and that they believed him but, in order to 'clean the table,' they wanted him to take a lie detector test" the following morning.[31] FBI Agent Teixeira would later testify that "[a]fter the six-hour interview, 'there was no reason . . . to consider [Awadallah] a suspect.'"[32]

After being driven home, Awadallah discussed the day's events with his three brothers who told him that they were going to retain an attorney to represent him, and that he should not take the lie detector test prior to consulting with his attorney and he agreed.[33]

Early the following morning, Awadallah informed Agent Teixeira of his decision to talk to a lawyer.[34] Teixeira assured him that that would not be necessary, that it would be "a short test," after which he would not be "bother[ed] . . . anymore."[35] When Awadallah resisted, Teixeira said "refusal to take the exam that morning would indicate that [he] was hiding something, and Agent Rielly would 'get a warrant for [his arrest].'"[36] "Believing that he had no choice," Awadallah took the test.[37] When the test was completed, he was told that the polygraph indicated that he had lied in responding to two questions:

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anything so there was no reason for us to consider him a suspect, that he would be a fugitive." *Id.* (alteration in original) (citation omitted).

[29] *Id.* at 89-90 (citation omitted).

[30] *Id.* at 92.

[31] *Id.* at 92 (citation omitted).

[32] *Id.* at 93. (third alteration in original).

[33] *Id.*

[34] *Id.*

[35] *Id.* (citation omitted).

[36] *Id.* (citation omitted). Nothing in the record suggests that the FBI had probable cause to support the issuance of an arrest warrant.

[37] *Id.*

> "(a) Did you know beforehand of any specific plans to destroy any of those U.S. targets, on 9/11/2001? Answer–No. (b) Did you participate in any way in any of those attacks against U.S. targets, on 9/11/2001? Answer–No."[38]

At this point, it became evident that Awadallah would not be permitted to leave. He was "told . . . that he was 'one of the terrorists' and he knew about the September 11th attacks in advance."[39] Awadallah repeatedly requested to attend Friday prayer and eventually was told that he not only would miss Friday prayer, but that he would be flown to New York and detained "for one year . . . [to] "'find out' more about him."[40] When he asserted his right to a lawyer, he was told that he had no rights.[41]

Without seeking judicial authorization, as required by the statute, an Assistant United States Attorney instructed the agents to arrest Awadallah as a material witness.[42] Some two and a half to three hours later, an application for a warrant to arrest Awadallah as a material witness was submitted to a federal judge in the Southern District of New York.[43] It alleged the following: the FBI believed that Nawaf Al-Hazmi was among the terrorists who crashed Flight 77 into the Pentagon on September 11th; a car owned by Al-Hazmi had been found in the Dulles Airport parking lot on the afternoon of September 11th; within the vehicle, agents found a piece of paper which bore the inscription "Osama 589-5316;" a telephone database search had revealed that this was Osama Awadallah's telephone number; and Awadallah had acknowledged that he knew Al-Hazmi but claimed few contacts and "'expressed surprise' that his name and phone number were found" on a slip of paper in the car.[44] Beyond this, the affidavit referred to the discovery in searches of Awadallah's cars and apartment, of "two videotapes concerning the 1993 war in Bosnia, . . . another videotape about the Koran, . . . 'a box-cutter, and several computer-generated photographs of Usama [sic] bin Laden.'"[45]

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[38] *Id.* at 94.

[39] *Id.* (citation omitted).

[40] *Id.* (citation omitted).

[41] *Id.* On appeal, the government did not dispute that Awadallah had been illegally seized on September 20 and September 21. *Awadallah II*, 394 F.3d 42, 71 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006). Because the ultimate subject of the litigation is a charge of perjury in regard to grand jury testimony, the constitutionality of all the events occurring in San Diego becomes irrelevant.

[42] *Awadallah I*, 202 F. Supp. 2d at 94.

[43] *Id.* at 95. The New York judge was not informed of the earlier arrest in San Diego. *Id.*

As to the need to place him under arrest, the affidavit continued,

> "it may become impracticable to secure the presence" of Awadallah because "he continues to maintain substantial family ties in Jordan and elsewhere overseas," which "make him a risk of flight while his admitted connection to the highjackers [sic] is under investigation. In addition, given Awadallah's connections to one or more of the hijackers who committed the terrorist attacks . . . Awadallah may have an incentive to avoid appearing before the grand jury. Awadallah may also be concerned that his prior conduct, as set out above, may provide a basis for law enforcement authorities to investigate and possibly prosecute him."[46]

On its face, this did not present a compelling case for issuing an arrest warrant. But Federal District Judge Scheindlin thought that the omission of a number of salient facts from the affidavit made the case even weaker. For example, the agents knew that Al-Hazmi had not lived in San Diego for over a year and more significantly that the telephone number found in the car had not been Awadallah's for longer than that.[47] As for the "box-cutter," the court noted that it was more properly described as "a push-up razor," which Awadallah said had been used as a carpet cutter to install carpet in his apartment.[48] There were witnesses who provided some support for this explanation.[49]

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[44] *Id.* (citation omitted).

[45] *Id.* (citations omitted).

[46] *Id.* (alteration in original) (citations omitted) (capitalization omitted).

[47] *Id.* at 96.

To authorize a detention under the statute, the court said that two explicit requirements must be satisfied: (1) that the testimony of the party be material, and (2) that securing the presence of the party by subpoena is impracticable.[50]

As to the question of materiality, the district court cited a 1971 decision from the Court of Appeals for the Ninth Circuit, *Bacon v. United States*,[51] wherein the court said that, "[i]n the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as a United States Attorney, is sufficient to satisfy [the requirement]."[52] This, according to the *Bacon* court, would be the equivalent of probable cause for an arrest. But the analogy hardly rings true. At least as early as 1964, in *Aguilar v.Texas*,[53] the Supreme Court held that the mere conclusion of an officer as to the existence of probable cause would not support the issuance of an arrest warrant.[54] And while *Aguilar* and its progeny[55] were later repudiated by the Supreme Court[56] for promulgating an overly formalistic standard for evaluating affidavits for arrests and searches, the Court has never deviated from its view that the determination of probable cause must be made by a judicial officer, and in that role the judicial officer is not to act as a rubber stamp. Nevertheless, the Human Rights Watch report stated, "We are not aware of a single case in which a court rejected a request for a material witness arrest warrant in a terrorism-related case since September 11."[57]

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[48] *Id.* at 96 & n.24 (citation omitted).

[49] *Id.* at 96 n.24.

[50] *Id.* at 96.

[51] 449 F.2d 933 (9th Cir. 1971).

[52] *Id.* at 943.

[53] 378 U.S. 108 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).

[54] *Id.* at 113-14.

[55] *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969).

[56] *See* Illinois v. Gates, 462 U.S. 213 (1983).

[57] WITNESS TO ABUSE, *supra* note 1, at 5. "Indeed, our research suggests the courts rarely even probed the government's grounds for believing a witness would

In any event, even using this relaxed standard for materiality, the district court found that the affidavit failed because the agent seeking the judicial order had no knowledge of the substance of the grand jury's investigation and hence had no basis for assessing materiality.[58] It concluded that "[t]he only officials who may be able to make an informed decision about a witness's materiality to the grand jury's investigation are '[a]ttorneys for the government . . . [who] may be present while the grand jury is in session.'"[59] But the court of appeals disagreed, concluding that "an FBI agent who works closely with a prosecutor in a grand jury investigation may satisfy the 'personal knowledge' requirement."[60]

The district court also found the argument favoring detention, as opposed to the use of a subpoena, to be weak. While the affidavit alleged that Awadallah had substantial ties to Jordan, it failed to mention that he also "had substantial ties to San Diego" in the form of three brothers, one of whom was an American citizen.[61] Second, there was no allegation of any basis for prosecuting Awadallah for "'prior conduct.'"[62] Third, Awadallah had consistently cooperated with the agents by consenting to searches of his home and vehicles, accompanying

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not comply with a subpoena to testify." *Id.*

[58] *Awadallah I*, 202 F. Supp. 2d 82, 97 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006). The affidavit read in part:

> "As part of the investigation in this matter, *I have* debriefed other agents and law enforcement officers who have been involved in this investigation, and *I have* reviewed relevant reports, documents and records in this investigation. Because the limited purpose of this affidavit is to support the issuance of the requested warrant, *I have* not set forth all the facts known to me, or to other agents or law enforcement personnel concerning this nationwide investigation. *I believe* the testimony of Osama Awadallah would be material to the grand jury's investigation."

Id. at 97 n.25 (capitalization omitted) (quoting Affidavit of Plunkett).

[59] *Id.* at 97 (quoting FED. R. CRIM. P. 6(d)(1)).

[60] *Awadallah II*, 349 F.3d 42, 66 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006),

[61] *Awadallah I*, 202 F. Supp. 2d at 97.

[62] *Id.*

them to their office for an interview, and acquiescing in "a polygraph examination without the presence of an attorney."[63] Fourth, "the agents failed to inform the court that the phone number found in the hijacker's car had not been used by Awadallah for eighteen months and was last used at a prior residence."[64] The district court concluded that "[i]f the misleading information had been removed and the omitted information disclosed, it is overwhelmingly likely that the court would have found that Awadallah's presence at the grand jury could have been secured by a subpoena."[65]

Again, the court of appeals was not persuaded. Affidavits for arrest and search warrants are traditionally evaluated as pleadings. That is, if the affidavit contains a prima facie statement of probable cause for the arrest or search requested, a reviewing court is unlikely to question its accuracy.[66] Only in cases in which the affiant is guilty "of deliberate falsehood or of reckless disregard for the truth" will a warrant be challengeable on these grounds.[67] In the present case, the court concluded, there was no basis for finding that the agent "intentionally misled the court or recklessly disregarded the truth."[68]

Following his arrest pursuant to the material witness warrant, Awadallah was incarcerated in four prisons, ending up in the New York correctional center.[69] In the course of the FBI interrogations, Awadallah was questioned in regard to two hijackers: Nawaf Al-Hazmi, the owner of the car found at Dulles Airport, and Khalid Al-Mihdhar.[70] Awadallah never denied that he knew Al-Hazmi.[71] He acknowledged that there had been a second individual, but denied knowing anyone named "Khalid."[72] The agents believed this to be a lie and were prepared to prove it.

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[63] *Id.* at 97-98.

[64] *Id.* at 98.

[65] *Id.*

[66] *See* JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:38 (3d ed. 1996).

[67] Franks v. Delaware, 438 U.S. 154, 171 (1978).

[68] *Awadallah II*, 349 F.3d 42, 66 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[69] *Id.* at 47.

[70] *Id.* at 47-48.

[71] *Id.* at 48.

District Judge Scheindlin said:

> The government knew that calling Awadallah before the grand jury placed him in an impossible position. If he testified in a manner consistent with his four prior statements to federal officials, as was to be expected, he would be indicted for perjury. If, on the other hand, he now admitted knowing Al-Mihdhar's *name* (as opposed to knowing *him*, which he repeatedly admitted), he could be indicted for having previously lied to federal officials.[73]

Either way he responded, Judge Scheindlin observed, "would have little, if any, impact on the pending investigation."[74] The government would, however, finally have a criminal charge against Awadallah, to wit, perjury, which appeared to be its only motivation.[75]

Twenty days after his arrest, on October 10, Awadallah testified before the grand jury in the Southern District of New York.[76] He acknowledged that he had met two of the hijackers at work and in his mosque, but stated that he had seen neither for a year prior to the attacks.[77] As expected, Awadallah denied knowing anyone named Khalid.[78] The prosecutor thereupon showed him an examination booklet obtained from his English teacher in San Diego, which included a sentence referring to an acquaintance named Khalid.[79] Awadallah denied that the reference to Khalid was in his handwriting.[80]

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[72] *Id.*

[73] *Awadallah I*, 202 F. Supp. 2d 82, 109 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[74] *Id.*

[75] *Id.* In an earlier opinion, Judge Scheindlin had raised the possibility that Awadallah had been caught in a "perjury trap." He now reluctantly conceded that "courts have repeatedly held that such a situation does not constitute a 'perjury trap.'" *Id.*

[76] *Awadallah II*, 349 F.3d at 48.

[77] *Awadallah I*, 202 F. Supp. 2d at 95.

[78] *Awadallah II*, 349 F.3d at 48.

[79] *Id.*

Five days later, he again appeared before the grand jury and "stated that his recollection of Khalid's name had been refreshed by his October 10 testimony and that the disputed writing in the exam booklet was in fact his own."[81] He was thereupon charged with two counts of making false statements to the grand jury: (1) "falsely denying that he knew Khalid," and (2) "falsely denying that the handwriting in the exam booklet was his."[82] These two charges of perjury are the only charges that have ever been brought against Osama Awadallah.

Of course, the opportunity for Awadallah to commit perjury only arose because he was arrested and while in custody subjected to interrogation without the benefit of constitutional protections, which produced the statements that eventually were the bases for the charges. It is true that courts have held that witness testimony is not tainted by prior illegalities, such as an illegal arrest.[83] But to allow this principle to prevail in a case in which the only basis of a criminal charge is the testimony itself would appear to be the ultimate in prosecutorial bootstrapping.

WHAT LITTLE THE SUPREME COURT HAS SAID

Earlier I noted that surprisingly the Supreme Court has never been called upon to consider the constitutionality of the material witness statute. The Court has, however, made isolated statements in two cases which have led some to conclude that it has spoken on the matter.[84]

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[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 12:4 (3d ed. 1996).

[84] *See* Stein v. New York, 346 U.S. 156 (1953); Barry v. United States *ex. rel.* Cunningham, 279 U.S. 597 (1929). There is a third case, *New York v. O'Neill*, 359 U.S. 1 (1959), in which the only issue before the Court was whether the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, FLA. STAT. ANN. §§ 941.01-942.06 (West 2006); N.Y. CODE

The first case is *Barry v. United States ex rel. Cunningham*[85] decided in 1929, which concerned a Senate investigation of the validity of the election of a Senator from Pennsylvania. Cunningham had been a member of an organization that supported the candidate in a primary election.[86] He had been a court clerk for twenty-one years and earned eight $8,000 annually.[87] In testimony before the investigating committee he acknowledged giving the chair of the campaign organization $50,000 in cash but refused to identify its source, insisting that it was his money.[88] The President of the Senate issued a warrant, directing the sergeant-at-arms to take Cunningham into custody and to hold him pending further instructions from the Senate.[89] The district court ruled that the order was not one for contempt but merely compelled Cunningham "to answer questions pertinent to the matter under inquiry."[90] The court of appeals reversed, holding that the arrest was for contempt, but that it was void, because the information sought by the investigating committee was not pertinent to the authorized inquiry.[91]

The Supreme Court concluded that the district court had it right, and that (1) the Senate was engaged in an inquiry within its constitutional power;[92] (2) the Senate was empowered to issue a warrant of arrest;[93] and (3) it was not essential that a subpoena first be issued, served and disobeyed before the arrest

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CRIM. PROC. § 620.20 (McKinney 1995), violated the Privileges and Immunities Clause. U.S. CONT. art 4, § 2. The court held that it did not. *O'Neill*, 359 U.S. at 11-12.

[85] 279 U.S. 597 (1929).

[86] *Id.* at 609.

[87] *Id.*

[88] *Id.* William S. Vare, the elected Senator at issue, had expended a sum in excess of $785,000 in the primary election. "Expenditure of such a large sum of money was declared to be contrary to sound public policy; and the special committee was directed to inquire into the claim of Vare to a seat in the Senate . . . ." *Id.* at 610.

[89] *Id.* at 611.

[90] *Id.* at 612.

[91] *Id.*

[92] *Id.* at 613-14.

[93] *Id.* at 616.

warrant was issued.[94] By analogy, the Court cited the contemporary version of the material witness provision in the federal code[95] with the observation, "[t]he constitutionality of this statute apparently has never been doubted."[96] That is the only thing the Court said pertinent to the present discussion.

Now, to say that the constitutionality of the statute has never been doubted is not tantamount to saying that its constitutionality has been sustained. Perhaps the reason the constitutionality had never been doubted is because no one had ever asked the question. The *Cunningham* Court cited only one case, *United States v. Lloyd*,[97] an 1860 district court decision, and said that in *that* case, "[t]he validity of the statute was not doubted."[98] This is true; indeed, if one reads the *Lloyd* decision, she will discover that the constitutionality of the statute was not doubted; the statute was not even mentioned. Nor was there occasion for the witness in the *Cunningham* case to raise doubts about the statute because it was not relied upon by the Senate in ordering his arrest.[99] At most, the *Cunningham* decision presumes the constitutionality of the statute, albeit in dicta.

The other case, *Stein v. New York*,[100] decided in 1953, contains the passage frequently cited by lower courts as resolving the question. The *Stein* Court said this:

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[94] *Id.* at 616-17. "[U]ndoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also, a court has the power in the exercise of sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming." *Id.* at 616.

[95] 28 U.S.C. § 659 (1940) (repealed 1948). This statute was a "forebear [18 U.S.C.] § 3144." *Awadallah II*, 349 F.3d 42, 57 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[96] *Barry*, 279 U.S. at 617.

[97] 4 Blatchf. 427, F. Cas. 984 (C.C.S.D.N.Y. 1860) (No. 15,614).

[98] *Barry*, 279 U.S. at 617.

[99] The Court also cited three state decisions in which similar statutes "have been enforced without question." *Id.* at 617-18 (citing State *ex rel.* Howard v. Grace, 18 Minn. 398 (1872); Crosby v. Potts, 69 S.E. 582 (Ga. Ct. App. 1910); *Ex parte* Sheppard, 66 S.W. 304 (Tex. Crim. App. 1902)). For present purposes, it is sufficient to note that these cases all were decided long before the protection of the Fourth Amendment had been extended to state proceedings. Neither this nor any other federal constitutional argument was before the respective courts.

[100] 346 U.S. 156 (1953).

> The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.[101]

Well, that appears pretty conclusive does it not? And it is, at least if you excise those two sentences from the context in which they appear. But on closer examination, there is less here than meets the eye. In support of this sentence, the Court only cites rules of criminal procedure in the federal courts and the state of New York. So the statement is merely descriptive of what governments do; it is not prescriptive of what they can do constitutionally. Not a single case is cited sustaining the practice, not even the Court's own *Cunningham* decision.[102]

Moreover, it turns out that this passage is even weaker dicta than that in *Cunningham*. In that case, it was at least possible that the courier with $50,000 was a material witness to some skullduggery. But in *Stein* there is not a material witness in sight. *Stein* is a straight-forward criminal case in which two defendants had been convicted of felony murder and sentenced to death. Their challenge to the admissibility of their confessions made a sweeping argument that interrogation was inherently coercive. The two quoted sentences are imbedded in a paragraph in which the Court extols the benefits of interrogation to the accused as well as to the government. The full paragraph reads as follows: "[b]y their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime."[103] And then come the two telling sentences: *"[t]he duty to disclose knowledge of crime rests upon all citizens.*

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[101] *Id.* at 184 (citation omitted).

[102] Nevertheless, *Stein* has been cited as controlling authority for the power to detain material witnesses. *See In re* Application for a Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for John Doe, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

[103] *Stein*, 346 U.S. at 184.

It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[104] And then comes the point relevant to the defendants: "[t]his Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive."[105] Hence, for purposes of the case before the Court, the Court is maintaining that if individuals innocent of all wrongdoing can be compelled to divulge information regarding crimes, surely individuals such as you, charged with a capital offense, may be subjected to non-coercive interrogation.[106] But the critical point is that there are no material witnesses asserting rights in the case. In short, in the only cases to have reached the Supreme Court in which reference is made to the constitutionality of the statute, the matter is irrelevant to both the parties and the issues before the Court.[107]

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[104] *Id.* (emphasis added) (citation omitted).

[105] *Id.*

[106] The *Stein* case predates the application of the privilege against self-incrimination and the right to counsel during interrogation.

[107] There is one additional decision worthy of mention. *Zadvydas v. Davis*, 533 U.S. 678 (2001), concerned resident aliens against whom a final order of removal had been entered. During the statutory ninety-day "'removal period,'" the alien was normally held in custody. *Id.* at 682. Should the alien not be removed during this period, a statute authorized unlimited detention thereafter. *Id.* (citing 8 U.S.C. § 1231(a)(6)). The Court held that there was an implicit reasonableness limit on post-removal period detentions, stating:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment–from government custody, detention, or other forms of physical restraint–lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individuals' constitutionally protected interest in avoiding physical restraint."

Id. at 690 (alteration in original) (citations omitted).

THE FOURTH AMENDMENT ANALYSIS

Lacking a definitive answer from the Supreme Court–or for that matter, from any other court–how then might this question be analyzed in light of the existing body of Fourth Amendment jurisprudence?

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[108] It can scarcely be gainsaid that individuals who have been taken into custody and involuntarily detained ostensibly for the purpose of giving testimony, have been arrested. But to support an arrest, as opposed to something less than an arrest, the official making the arrest must have probable cause. Probable cause for an arrest was defined in *Beck v. Ohio*[109] as "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[110] Similar language has been used by the Supreme Court in numerous cases before and after *Beck.*[111] While the presence or absence of probable cause has frequently been a difficult decision, never has it been doubted that to make an arrest there must be reason to believe that the subject *had committed or was committing an offense*. When a material witness is taken into custody, by definition that is not the case. Indeed, one federal court[112] has observed that "individuals detained as material witnesses are rarely charged with crimes"[113] and described the plight of the detained material witness thus:

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[108] U.S. CONST., amend. IV.

[109] 379 U.S. 89 (1964).

[110] *Id.* at 91 (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Henry v. United States, 361 U.S, 98, 102 (1959)).

[111] *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 37 (1979).

[112] *In re* Class Action Application for Habeas Corpus *ex rel.* All Material Witnesses in the W. Dist. of Tex., 612 F. Supp. 940 (W.D. Tex. 1985).

[113] *Id.* at 944.

> With no charges lodged against them, material witnesses are held in custody for periods ranging from several weeks to several months. If the material witness were charged with a crime, he would be entitled to appointment of counsel if he was financially unable to afford one. The material witness is deprived of liberty without an opportunity to consult with counsel or to have his interests represented because he is not charged with a crime. Consequently, individuals that are incarcerated without being charged with criminal activity are afforded less protection than individuals charged with criminal activity.[114]

Recall again the case of Osama Awadallah. At no time, from the beginning until the end of his story, and even thereafter, did the authorities have probable cause to arrest him for anything. In fact, they conceded as much. Had they arrested him at his apartment, they could have taken him into custody, carried out a search incident to the arrest, and searched his cars if there was probable cause to believe they contained anything seizable. But in fact, they had nothing on him at all. Presumably, that is why they finagled him into consenting to the various searches and attempted to create the impression that his trips to the FBI office were all at his own volition. Had they attempted to justify any of these tactics as incident to his arrest, they undoubtedly would have lost.

Of course, the Supreme Court has recognized circumstances short of probable cause which will support a detention. A less demanding standard was articulated by the Supreme Court in *Terry v. Ohio*[115] for field detentions. In such cases, only a reasonable suspicion is required. But this line of precedent is equally unavailing. First, the *Terry* decision merely adapted the language previously used by the Court in defining probable cause to arrest so as to apply to field detentions. Therefore the power to detain also only applies to individuals suspected of criminal activity, and such has been the case whenever the Court has applied *Terry*. Second, even if it be assumed that individuals such as Osama Awadallah are suspected of criminal activity, an additional problem in applying the *Terry* rationale is that it only supports field detentions. The *Terry* decision and later decisions by the Supreme Court have held without exception that the detainee cannot be taken against his will to the stationhouse.[116] Only if probable cause legitimately arises during the course of a field detention may an arrest and possibly an incident search occur. In short, the most fundamental Fourth Amendment principles will not support taking into custody an individual for whom there is no probable cause to arrest or even articulable suspicion of criminal activity.

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[114] *Id.* at 944-45.

[115] 392 U.S. 1 (1968).

Of course, the response to this analysis may be that the problem being addressed is *sui generis*, that the existing precedents are simply inapplicable. We might first observe that the Supreme Court has shown little patience with attempts to define away Fourth Amendment issues. For example, the majority opinion in *Terry* began by rejecting the suggestion that field detentions are of too low visibility to warrant constitutional scrutiny.[117] And in *Camara v. Municipal Court*,[118] the Court held that the routine activities of building inspectors were nonetheless searches within the contemplation of the Fourth Amendment, even though they were not engaged in criminal investigation.[119] It would seem, therefore, that the question raised with respect to material witness detentions cannot simply be ignored.

When confronted with questions of first impression in interpreting the Fourth Amendment, the Supreme Court has on occasion examined the prevailing practices at the time of the ratification of the United States Constitution. The idea here is that the Fourth Amendment enjoins only those searches and seizures which are "unreasonable." If a particular investigative practice was accepted in England at the time of ratification, it might be assumed to be reasonable, or at least not prohibited, by the Fourth Amendment.

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[116] *See* Kaupp v. Texas, 538 U.S. 626 (2003); Hayes v. Florida, 470 U.S. 811 (1985); Dunaway v. New York, 442 U.S. 200 (1979); Davis v. Mississippi, 394 U.S. 721 (1969).

[117] 392 U.S. at 8-9.

[118] 387 U.S. 523 (1967).

[119] *Id.* at 534.

There is, of course, a major flaw in this assumption. That is that the Bill of Rights in general, and the Fourth Amendment in particular, were in large measure a repudiation of English practices which were considered intolerable. For example, the use of general warrants to carry out indiscriminate searches was considered particularly abusive. In this case, however, the particular language of the Fourth Amendment addressed the matter by mandating that warrants particularly describe the place to be searched and the things to be seized. Insofar as the Amendment did not specifically provide answers, the default expectation was that established law enforcement procedures were unaffected.[120]

The answer, then, to the riddle of the detention of material witnesses might simply be resolved by the revelation that the practice was well-established in England during the colonial era. Indeed, in 1971, the Court of Appeals for the Ninth Circuit said precisely that. In *Bacon v. United States*,[121] the court reassured the readers of its opinion that the detention of material witnesses was hardly extraordinary, because it was "consonant with the long established rule of English Law, in effect when the United States became a nation."[122] To support this statement, the court cited a single English case that was decided in 1612.[123] It would appear to be the only case cited by this or any other court for the long established rule of English Law. The intrepid academic who succeeds in tracking this one down among the dusty tomes in rarely visited library stacks may be excused for saying, "this better be a good one."

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[120] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999), for a definitive study of the original meaning of the Fourth Amendment and its relation to the common law.

[121] 449 F.2d 933 (9th Cir. 1971).

[122] *Id.* at 938-39. The suggestion that the power granted by the federal material witness law to detain witnesses prior to the failure to comply with a subpoena was established at common law has been asserted by a number of commentators. *See* Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L.J. 401, 405 n.19 (2003); Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534-36 (1994); Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75, 82 (1999); Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 37-38 (1958). The evidence presented to support this conclusion is unconvincing. Given that the trial of the

The case is styled the *Countess of Shrewsbury's Trial*,[124] and this is her story: at apparently some time in the early part of the seventeenth century, one Lady Arabella Stuart married Sir William Seymour. Arabella was a first cousin of James I. She was a Catholic, and at one point, the Pope had a grand design for an arranged marriage that would put Arabella on the English throne. The plot failed, and James became firmly ensconced as monarch, but he remained apprehensive regarding her children having claim to the throne. To that end, he forbade the marriage of Arabella to William Seymour. They nonetheless were secretly married. In the words of the court reporter, "[b]eing a marriage with one so nearly related in blood to the king, and without his consent, it was deemed an offence [sic] against the royal prerogative, on which account lady Arabella and her husband were imprisoned; the former in a private house at Lambeth, the latter in the Tower."[125] They

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Countess of Shrewsbury would appear to be the only pre-American revolution decision cited by courts or commentators illustrative of the practice and that the decision fails to support the claim, skepticism would seem justified. The misunderstanding appears to have resulted from the confusion of the power to compel testimony (never questioned) and the power to detain in anticipation of testifying. For example, Studnicki captions a section of her article, *supra*, "The Common Law Power to Detain a Witness." The text, however, speaks only to the power to compel testimony and to punish those who defied a subpoena.

But see Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 706-07 (2005) ("If the *Bacon* court's history is correct, it means that the Founding Fathers themselves authorized the incarceration of individuals who were not even suspected of committing a crime. As history and common sense have it, the *Bacon* court got history wrong.") (footnote omitted).

[123] *Bacon*, 449 F.2d at 938-39 (citing Countess of Shrewsbury's Trial, 2 How. St. Tr. 769 (1612)).

[124] 2 How. St. Tr. 769 (1612).

[125] *Id.* at 769 (footnote omitted).

both managed to escape and fled in separate ships to France, King James' men captured Arabella before she reached Calais, and she was returned to the Tower. She died there, never seeing William again.

Mary Talbot, the Countess of Shrewsbury, was Arabella's aunt. She was suspected of abetting this scheme, having prior knowledge of both the wedding and the escape. When called before the Privy Council, however, she refused to divulge any information. As a result, she too ended up in the Tower and was brought before a select council "charged with a high and great contempt of dangerous consequence."[126] According to the case report, Lady Arabella "had no evil intent against the king,"[127] but had simply been corrupted by her evil aunt. "And the lords of the Privy Council, knowing the *arcana imperii* [state secrets], did shew [sic] divers perilous consequences, and the rather for this, that the said countess is an obstinate popish recusant, and as was said, perverted also the lady Arabella."[128]

The Countess of Shrewsbury proffered two arguments in her defense: (1) "she had made a rash vow that she would not declare any thing in particular touching the said points; and for that (as she said) it was better to obey God than man,"[129] and (2) "[s]he stood upon her privilege of nobility."[130] The court found both defenses unavailing, holding that "the countess by her allegiance was bound, without being demanded, to reveal to the king what she knows concerning the premises, upon which great mischief may happen to the king and the realm."[131]

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[126] *Id.* at 770 (footnote omitted).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 770-71.

[131] *Id.* at 775. Addressing Lady Arabella, Sir Francis Bacon said:

> For that which you are properly charged with, you must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be any thing that imports the king's service, they ought themselves undemanded to impart it; much more if they be called and examined, whether it be of their own fact or of another's, they

As is readily apparent, the *Shrewsbury* decision provides no support for the notion that the English common law recognized a power to detain material witnesses. The Countess of Shrewsbury was not a material witness; rather, she was a party "charged with a high and great contempt."[132] While the charge against her arose out of her refusal to testify, the substantive charge of abetting the illegal marriage and escape of Lady Arabella arose prior to the time she was taken into custody.

For at least a half century prior to the trial of the Countess of Shrewsbury, the law of England authorized compelling the testimony of witnesses in criminal and civil cases. The Second Act of Phillip and Mary in 1555 empowered justices to bind over witnesses to give evidence against defendants in felony cases.[133] And in 1562, the Statute of Elizabeth provided that in civil cases, any person who refused to testify after being served with process would be subject to a ten pound fine as well as damages for the harm caused to the aggrieved party.[134] Under neither statute, however, was there any recognition of a power to detain witnesses in anticipation of their giving evidence. Similarly, the criminal defendant's right to the compulsory process of witnesses was recognized by the Act of William III in 1695, which gave parties indicted for treason "like [Process] of the Court where they [s]hall be tried, to compel their [Witnesses] to appear for them at any [s]uch Trial or Trials, as is [usually] granted to compel [Witnesses] to appear [against] them."[135] Again, however, there is no suggestion in the law that a potential witness could be incarcerated to insure his presence at the trial.

Moreover, sixteen years after the Countess of Shrewsbury's case, on June 7, 1628, the House of Commons, under the leadership of Sir Edward Coke, enacted the Petition of Right, which

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ought to make direct answer.

Id. at 778.

[132] *Id.* at 770.

[133] Marian Committal Statute, 1555, 2 & 3 Phil. & M., c. 10, § 2 (Eng.).

[134] 1562, 5 Eliz., c. 9, § 12 (Eng.).

[135] 1695, 7 & 8 Will. 3, c. 3, § 7 (Eng.).

sought to reinvigorate the principles of liberty articulated in Magna Carta.[136] In the matter of individual liberty, in petitioning Charles I it observed that, notwithstanding laws to the contrary, including Magna Carta, "divers of your subjects have of late been imprisoned without any cause shewed [sic]," and that when challenges were brought, certain individuals "were returned back to several prisons, without being charged with any thing to which they might make answer according to the law."[137] The Members of the House concluded by

> humbly pray[ing] . . . that your Majesty would be . . . graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, [t]hat in the things aforesaid all our officers and ministers shall serve you according to the law and statutes of this realm, as they tender the honour [sic] of your Majesty, and the prosperity of this kingdom.[138]

Finally, insofar as the common law in the United States is concerned, both federal and state courts have rejected the notion of a common law power to detain material witnesses prior to failure to honor a subpoena.[139]

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[136] *See* SOURCES OF OUR LIBERTIES 62, 62 (Richard L. Perry & John C. Cooper eds., New York 1964) ("The Petition of Right was 'the first of those great constitutional documents since Magna Carta, which safeguard the liberties of the people by securing the supremacy of the law.' It has also been called 'the second Great Charter of the liberties of England' and 'the first great official interpretation of Magna Carta since the time of Edward III.'") (footnotes omitted) (quoting WILLIAM HOLDSWORTH, 5 A HISTORY OF ENGLISH LAW 449 (1927); THOMAS MACAULAY, THE HISTORY OF ENGLAND 74 (Charles H. Firth ed., 1913-15); RODNEY L. MOTT, DUE PROCESS OF LAW 81 (1926)).

[137] Petition of Right (1628) sec. V, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 136, at 74.

[138] *Id.* at sec. XI.

[139] *See* Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971); State v. Hand, 242 A.2d 888, 892 (Essex. County Ct. 1968); Little v. Territory, 114 P.2d 699, 699 (Okla. 1911); Bates v. Kitchel, 125 N.W. 684, 686 (Mich. 1910); Comfort v. Kittle, 46 N.W. 988 (Iowa 1890); Bickley v. Commonwealth, 25 Ky. (2 J.J. Marsh.) 572, 572 (1829); *cf.* Crosby v. Potts, 69 S.E. 582, 582-83 (Ga. Ct. App. 1910) (indicating how early English common law compelled witnesses to testify for the government). *See also* Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 20-25 (1969) (discussing the status of

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If, then we can find no conventional support for sustaining such detentions, the possibility remains that, at least in the case of thwarting terrorism, we may be justified in developing a theory from whole cloth. This approach is reflected in much of the rhetoric of governmental officials. Following 9/11, Attorney General Ashcroft was quoted as saying that henceforth, it would be necessary for federal law enforcement to "'think outside the box.'"[140] Interpreted in the most favorable light, this observation may be read as suggesting that the protection of the Fourth Amendment is malleable and that reasonableness is in part a function of the felt necessities of the time.

There is precedent for interpreting the Fourth Amendment to accommodate the pressing needs of a particular historical period. For example, both the vehicle exception[141] and the open fields exception[142] to the warrant requirement were developed during the Prohibition era and at least in part were concessions to the fact that liquor laws could not be enforced effectively so long as officers could not search the vehicles of bootleggers or ferret out moonshine stills in remote locations without prior judicial authorization. In our own time, and long before 9/11, courts have sustained the practice of searching persons and hand-carried luggage in airports as a means of thwarting airline hijacking. A few years earlier, the same intrusions would have been condemned as patently unconstitutional.

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the material witness law in various states); Robert Odlin Coyle, Comment, *Confining Material Witnesses in Criminal Cases*, 20 WASH. & LEE L. REV. 164, 164-68 (1963) (discussing the rights of a material witness); Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 700-34 (discussing the balance between the interests of the state and the individual); Bernard Silverman, Comment, *Material Witnesses in Criminal Proceedings: Securing and Assuring Their Attendance*, 18 MO. L. REV. 38, 38-53 (1953) (suggesting ways that material witness laws may be improved).

[140] General Larry D. Thomson, U.S. Deputy Attorney Gen., Remarks Delivered to the National Black Prosecutors Association (Aug. 8, 2002), http://www.usdoj.gov/dag/speech/2002/080802nbparemarks.htm (last visited Oct. 22, 2006).

[141] Carroll v. United States, 267 U.S. 132 (1925).

[142] Hester v. United States, 265 U.S. 57 (1924).

In practice, today the material witness statute is rarely used in other than terrorist-related investigations. Prior to 9/11, it had been used almost exclusively by the Immigration and Naturalization Service in illegal immigration investigations.[143] But the fact that the power is rarely used is far from reassuring. For if we accept the unchallenged assumption that the law is constitutional, it means upon a proper showing of risk, either (a) material witnesses in all cases may be detained indefinitely should federal prosecutors choose to use their power more liberally, or (b) the only parties at risk are material witnesses that match the profile of previously identified terrorists.

If the first reading is correct–if prosecutors have the constitutional right to detain any material witness upon no more of a showing than the prosecutor's averment that the witness will likely not honor a subpoena–then surely the practice deserves constitutional scrutiny. If, on the other hand, the law is only used as a weapon against terrorism, and only individuals who fall within a class of suspected terrorists are vulnerable, then there are different reasons to voice constitutional concern.

Over a half century ago, this country subjected a significant number of its citizens to involuntary internment for no reason other than their being of Japanese heritage. While that action was sustained by the Supreme Court,[144] it is not a celebrated episode in American history.[145]

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[143] *See* Witness to Abuse, *supra* note 1, at 14 (footnotes omitted) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2000*, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs00.htm.):

> Before September 11, the vast majority of persons arrested as material witnesses were non-U.S. citizens arrested by the former Immigration and Naturalization Service (INS). In 2000, for example, 94 percent of the 4,168 federal material witness arrests were made by the INS, and less than 2 percent were citizens. Most of the material witnesses arrested by the INS were immigrants who were smuggled into the country, and the INS sought to ensure their testimony in trials against the smugglers before the witnesses left the country.

[144] Korematsu v. United States, 323 U.S. 214 (1944).

[145] *See* John M. Burkoff, *"A Flame of Fire": The Fourth Amendment in Perilous*

And yet, some may nonetheless argue that today the risks are too high: that those who share a cultural and/or religious affinity with our avowed enemy may either return to their homeland or otherwise accept that their identity subjects them to greater scrutiny. In other words, it is simply a question of survival.

We have heard this argument before, and in a context similar to that of Osama Awadallah. On June 28, 1954, Lloyd Barenblatt was subpoenaed to testify before the House Un-American Activities Committee at the height of the Red Scare.[146] Barenblatt declined to answer five questions regarding his knowledge of Communist Party activities at the University of Michigan.[147] One of the questions concerned his knowledge of the Communist Party affiliation of a named individual.[148] For his refusal to answer, Barenblatt was held in contempt.[149] The Supreme Court affirmed the conviction.[150] A majority of the Court was prepared to give deference to Congress regarding the magnitude of the problem it addressed and the appropriate way of responding to it.[151] Four Justices, however, dissented.[152] Justice Black, in an impassioned opinion denied that, in this case, "First Amendment freedoms must be abridged in order to 'preserve' our country."[153] "That notion," he said, "rests on the unarticulated premise that this Nation's

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Times, 74 Miss. L.J. 631, 652 (2004) ("[S]uspending or ignoring the Fourth Amendment and other constitutional protections in perilous times, even in times of legitimate and serious threats to our national security, was not only *not* productive, it was instead *destructive* of our constitutional fabric, and of our self-congratulatory claims, trumpeted throughout the world, that we are a nation of democratic virtues governed by the fair and even-handed application of the rule of law.").

[146] Barenblatt v. United States, 360 U.S. 109 (1959).

[147] *Id.* at 114.

[148] *Id.*

[149] *Id.* at 115.

[150] *Id.* at 134.

[151] *Id.*

[152] *Id.* at 134, 166. Justice Black filed a dissenting opinion, in which Chief Justice Warren and Justice Douglas joined. *Id.* at 134. Justice Brennan filed a dissenting opinion. *Id.* at 166.

[153] *Id.* at 145 (Black. J., dissenting).

security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes."[154]

Barenblatt would not speak to his knowledge regarding Francis Crowley.[155] Awadallah disavowed that he knew Khalid Al-Mihdhar.[156] Never mind the fact that in both cases the interrogator undoubtedly already knew the answers to the questions, so the witness was not withholding otherwise inaccessible information. Never mind that it strains credulity to believe that Barenblatt's responses would be vital to the drafting of anti-communist legislation or that Awadallah's would be vital to the war against terrorism. In both cases, the failure to respond satisfactorily to their inquisitors culminated in a citation for contempt.

Notwithstanding the claim of the Justice Department that each of the detained witnesses had information relevant to potential prosecutions for terrorist activities, at least thirty of the seventy individuals examined in the Human Rights Watch study never appeared before a grand jury or at a trial as witnesses, and "only seven were ever arrested on terrorism-related charges."[157] And yet, "[o]ne-third of the seventy . . . witnesses . . . were incarcerated for at least two months."[158]

The challenge to our system of justice and the rule of law could not be clearer: how can we remain true to the values of the freest society the world has ever known while responding effectively to those who would destroy us? In his seminal work, *A Theory of Justice*, philosopher John Rawls referred to this dilemma as the obligation in a democratic society to "tolerate[] . . . the intolerant."[159] Rawls allowed "that an intolerant sect has no title to complain when it is denied an equal liberty," because "[a] person's right to complain is limited to violations of principles he acknowledges himself."[160] But, he continued, it did not follow from this that the tolerant have the right to suppress the intolerant.[161] Only in those instances in which "they sincerely and with reason believe that intolerance is necessary for their own security" can they legitimately draw the line.[162] The governing principle, according to Rawls, was this:

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[154] *Id.*

[155] *Id.* at 114 (majority opinion).

[156] *Awadallah I*, 202 F. Supp. 2d 82, 87 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[157] Witness to Abuse, *supra* note 1, at 2.

[158] *Id.* at 3.

[159] JOHN RAWLS, A THEORY OF JUSTICE 90 (rev. ed. 1999).

> [J]ust citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger. They can properly force the intolerant to respect the liberty of others. . . . But when the constitution itself is secure, there is no reason to deny freedom to the intolerant.[163]

"The leading principle," Rawls concluded, "is to establish a just constitution with the liberties of equal citizenship."[164] Our response to the intolerant "should be guided by the principles of justice and not by the fact that the unjust cannot complain."[165]

During the course of my remarks, I have, somewhat randomly, shifted my focus between two dimensions of the issue before us. At the broader constitutional level, I have suggested that there are serious reasons to question the per se legitimacy of detaining material witnesses. In the context of contemporary practice, I have called attention to the aggravated circumstances in which the law is being used in the investigation of terrorist activities. But I am not suggesting that the use of the power in this category of cases is uniquely troubling; rather, I have focused on such cases simply because that is where the power is being used today. Simply because the law is being used primarily against an insular and largely unpopular minority is not reason to ignore the constitutional question. Indeed, it provides all the more reason to do so.

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[160] *Id.*

[161] *Id.* at 191.

[162] *Id.* at 192. "Justice does not require that men must stand idly by while others destroy the basis of their existence." *Id.*

[163] *Id.*

[164] *Id.* at 193.

[165] *Id.*

In the post-9/11 world, it is an unfortunate happenstance to be named "Osama." Perhaps the prudent Middle Easterner would shorten his name to "Sam." But it is no crime to fail to do so.

EPILOGUE: THE CONTINUING SAGA OF OSAMA AWADALLAH

Notwithstanding that Osama Awadallah has never been convicted or even charged with any crime related to the events of September 11, 2001,[166] federal authorities have continued their relentless pursuit of a perjury conviction based upon Awadallah's denials that he was acquainted with one of the terrorists and that the handwriting in an examination booklet was his. Awadallah was released on bail in November 2001, thereafter graduated from Grossmont College and enrolled as a full-time student at San Diego State University.[167]

At a pretrial conference on May 16, 2005, the prosecution submitted a supplemental list of witnesses that it might call at the trial for perjury.[168] When the defense requested identification of these witnesses, the prosecution declined, maintaining that it was not required to do so prior to trial.[169] The trial court ordered the prosecution to do so, whereupon it disclosed that the witnesses included several members of the grand jury that had returned the indictment against Awadallah.[170]

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[166] The prosecution nevertheless endeavored to associate Awadallah with those events at his trial, which ended in a mistrial apparently as a result of the emotional element which pervaded the jury deliberations. United States v. Awadallah (*Awadallah VI*), No. 01 CR 1026 (SAS), 2006 WL 2242442, at *5 (S.D.N.Y. Aug. 3, 2006). Although Judge Scheindlin "admonished the jury that Awadallah was not charged with participating in the September 11 attacks," the prosecution began and ended its closing argument "with an appeal to recall that this case involved 'the worst terrorist attacks in [this/our] nation's history.'" *Id.* at *5 & n.53 (alteration in original) (citation omitted). Judge Scheindlin observed that the "problem was undoubtedly exacerbated" by this tactic. *Id.* at *5 n.53.

[167] United States v. Awadallah (*Awadallah III*), 401 F. Supp. 2d 308, 312 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[168] *Id.*

[169] *Id.*

In explaining the relevance of the testimony of these witnesses, the prosecution referred to Awadallah's indicated defense "'that any incorrect statements he may have made in his October 10 grand jury testimony were not knowingly made [but were] the result of memory lapse, misunderstanding, exhaustion, confusion and intimidation.'"[171] "To rebut this defense," the prosecution intended "to call the grand jurors to testify to their impressions of Awadallah as he testified–namely that 'he neither appeared nor behaved as if he were confused or conversely that he appeared lucid or coherent.'"[172] At the time of this request, the prosecution had already contacted and interviewed many if not all of the members of the grand jury.[173] Upon learning of this, counsel for Awadallah "requested permission to contact the grand jurors to determine whether he might wish to call any of them as trial witnesses."[174] The trial court thereupon wrote each of the grand jurors to determine if any would be willing to be interviewed by defense and six jurors agreed.[175]

On May 24, 2005, the court made a preliminary ruling on the admissibility of the proposed testimony. It ruled "that the grand jurors [could] testify as to the physical conditions of the room during Awadallah's grand jury testimony, Awadallah's physical appearance, and the behavior and manner of the prosecutor."[176] The court also ruled "that the grand jurors may not testify as to whether, in their opinion, Awadallah's testimony was knowingly false, or whether Awadallah appeared 'confused' during his testimony."[177]

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[170] *Id.*

[171] *Id.* (alteration in original) (quoting Def.'s Reqs to Charge No. 3, at 5).

[172] *Id.* (quoting Government's Letter of May 23, 2005).

[173] *Id.*

[174] *Id.*

[175] *Id.* "[O]ne juror informed the Court that he was not willing to talk to Mr. Berman [counsel for Awadallah]; two more jurors were unwilling to be contacted by Mr. Berman, but asked that the Court give them Mr. Berman's number, so they could contact him if they chose." *Id.* at 312-13.

[176] *Id.* at 313.

[177] *Id.*

Both parties urged the trial court to reconsider the ruling, the defense contending that the testimony should not be permitted at all, and the prosecution maintaining that the scope of testimony had been improperly restricted.[178] After due consideration, the trial court's final order was essentially an elaboration of its preliminary ruling:

> [T]he grand jurors are precluded from testifying as to their subjective impressions. However, the grand jurors are not precluded from testifying as to objective physical conditions and events in the may [sic] draw its own conclusions from the grand jurors' testimony as to physical facts; the danger that the trial jurors will simply defer to the grand jury's opinion of Awadallah's intent is not present if the testimony is so limited. . . .
>
> Accordingly, the grand jurors may testify as to, *e.g.*, the temperature, layout and occupancy of the room, or whether anyone raised their voice or made any threatening physical gestures, or whether Awadallah showed signs of physical injury. However, they may not testify as to their mental impressions: *i.e.*, that Awadallah did or did not appear lucid or composed, or did or did not appear confused, or that the prosecutor did or did not appear to be intimidating.[179]

The prosecution appealed this ruling to the Court of Appeals for the Second Circuit, which affirmed.[180] In its appeal, the prosecution also requested that on remand the case be assigned to a different district judge "'to preserve the appearance of justice.'"[181] The court of appeals observed that no such request had been made by the Office of the United States Attorney for the Southern District of New York since 1973, and in all the cases cited by the prosecution in support, the request had been made by the defendant, or initiated by the court itself on the defendant's behalf.[182] The court denied the motion, finding no support for the prosecution's contention that the trial judge had either acted as an advocate for the defendant or prejudged ultimate issues favorable to the defendant.[183]

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[178] *Id.*

[179] *Id.* at 320.

[180] United States v. Awadallah (*Awadallah IV*), 436 F.3d 125 (2d Cir. 2006).

[181] *Id.* at 128.

[182] *Id.* at 135.

On May 23, 2005, the day prior to the pretrial conference at which the court made its preliminary ruling,

> [T]he parties selected a panel of twelve jurors and three alternate jurors. . . . The [final] ruling was published . . . on May 31 and the Government immediately filed an appeal. The jury had not yet been sworn, . . . [and the trial judge] informed that jury that "unforeseen events and circumstances prevent us from going forward with this case at this time." [The judge then] gave the [jury] the following instructions:
>
> > So what happens next is that your jury service is over without this trial proceeding at this time. When we can proceed, we will call all of you. And if you are able to serve, in other words, if you're not out of town or in some other way unavailable, if you're able to come back and serve, we will keep this jury. But we can't ask you to put your lives on hold. So you can go back to our work, go back to your plans, go back to your summer vacations, because we can't tell you the exact date. But when that date comes, and it could be days, could be more, we will call you. And if you're available, you are the jury in this case and that's what we'll do.[184]

The court of appeals affirmed the evidentiary ruling on January 26, 2006, and on February 10, the trial judge notified the fifteen panel members that the trial was to commence on April 17, and asked each juror whether he or she would be available and if not to provide an explanation.[185] The prosecution contended that to recall any of the jurors on the panel would violate the Jury Service and Selection Act, which provides that "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[186] The parties agreed that if all fifteen previously chosen jurors were available to serve, the trial could proceed.[187] The defense argued that using less than all of the properly selected jurors did not violate the Act, and that to hold otherwise would "reward[] the [prosecution] for taking an appeal on which it failed to prevail."[188] The prosecution responded that to use some but not all of the prior panel would be tantamount to impaneling "volunteer[]" jurors, a practice which had been held to violate the Act.[189]

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[183] *Id.* at 135-37.

[184] United States v. Awadallah (*Awadallah V*), No. 01 CR. 1026(SAS), 2006 WL 738407, at *2 (S.D.N.Y. Mar. 23, 2006) (footnotes omitted) (quoting *Awadallah III*, 401 F. Supp. 2d 308, 310 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006); Transcript of Record at 11-12).

[185] *Id.* at *2.

The trial court responded that the recalled jurors could not properly be considered volunteers, because they had been instructed that their obligation to serve had not ended.[190] The original panel had been "'selected at random from a fair cross section of the community,'" and no argument had been put forward that the recall would result in "'impermissible discrimination against individuals or group.'"[191] Rather, the jurors would all remain obligated to serve, absent an individual showing of "'undue hardship or extreme inconvenience.'"[192] The court concluded that no substantial violation of the Act would result.[193]

At the same time, the court noted that while the defendant had a significant interest in have his fate determined by the jury first impaneled, the prosecution had "a countervailing interest in the opportunity to choose a complete jury at once, using its peremptory strikes strategically to obtain a desired whole."[194] To this end, it ruled that all recalled jurors would

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[186] 28 U.S.C. § 1861 (2000).

[187] *Awadallah V*, 2006 WL 738407, at *3.

[188] *Id.* at *3.

[189] *Id.*

[190] *Id.* at *4-5.

[191] *Id.* at *4 (citations omitted).

[192] *Id.* (citation omitted)

[193] *Id.*

[194] *Id.*

> be subjected to a renewed voir dire examination. Any juror not excused for cause [would] be seated as part of the panel of thirty-five people from which the jury and alternates shall be chosen. Additional voir dire [would] be conducted to complete th[e] panel. [Thereafter both parties would] be entitled to use peremptory strikes in the usual manner.[195]

In May of 2006, the proceedings against Awadallah culminated in a mistrial.[196] Thereafter, Awadallah moved for a change of venue, citing the fact that "[d]uring the 'emotionally heated jury deliberations,' some jurors 'were tearfully discussing their September 11 recollections in the jury room.' This . . . convinced Awadallah that 'New Yorkers are too close to the events of September 11, 2001' for him to receive a fair trial in the Southern District of New York."[197] The court found the argument less compelling than other cases in which the issue was raised, because Awadallah was charged with perjury, not terrorism.[198] Nonetheless, the court acknowledged that the evidence adduced regarding the deliberations in Awadallah's trial revealed bias in the jury deliberations.[199] "Thus," the judge cautioned, "the first deliberation should be treated as a miner's canary, alerting all parties to the possibility of dangerous prejudice flowing from jurors' personal experiences of the September 11 attacks."[200] She nevertheless concluded that the problem would not likely be alleviated, and might indeed be exacerbated, by moving the trial to another venue, and the motion was denied.[201]

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[195] *Id.*

[196] *Awadallah VI*, No. 01 CR 1026 (SAS), 2006 WL 2242442 (S.D.N.Y. Aug. 3, 2006).

[197] *Id.* at *1 (footnote omitted) (quoting Letter from Sarah Kunstler, Counsel to Defendant, to the Court (May 20, 2006) (on file with the court)).

[198] *Id.* at *4. The court distinguished the Timothy McVeigh case, in which the trial was moved from Oklahoma City, Oklahoma, to Denver, Colorado.

[199] *Id.* at *5.

[200] *Id.*

[201] *Id.* Judge Scheindlin offered three reasons for her conclusion: (1) "[T]he effects of the September 11 attacks were felt nationwide, and there is no reason to believe that jurors in a different jurisdiction would lack an emotional response

On the fifth anniversary of the 9/11 attacks, the case of Osama Awadallah appeared no nearer to resolution than on the day of his arrest, September 21, 2001.

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with prejudicial effects." *Id.* (2) The likelihood of "'intensive publicity'" might be greater in a small city than in Manhattan. *Id.* (quoting United States v. Dioguardi, 428 F.2d 1033, 1039 (2d Cir. 1970)). (3) "[T]he Southern District of New York serves one of the country's most 'diverse cross-section of ethnicities, backgrounds, and experiences," reducing the potential for local bias. *Id.* (quoting United States v. White, No. 02 CR. 1111, 2003 WL 721567, at *5 (S.D.N.Y. Feb. 28, 2003)).

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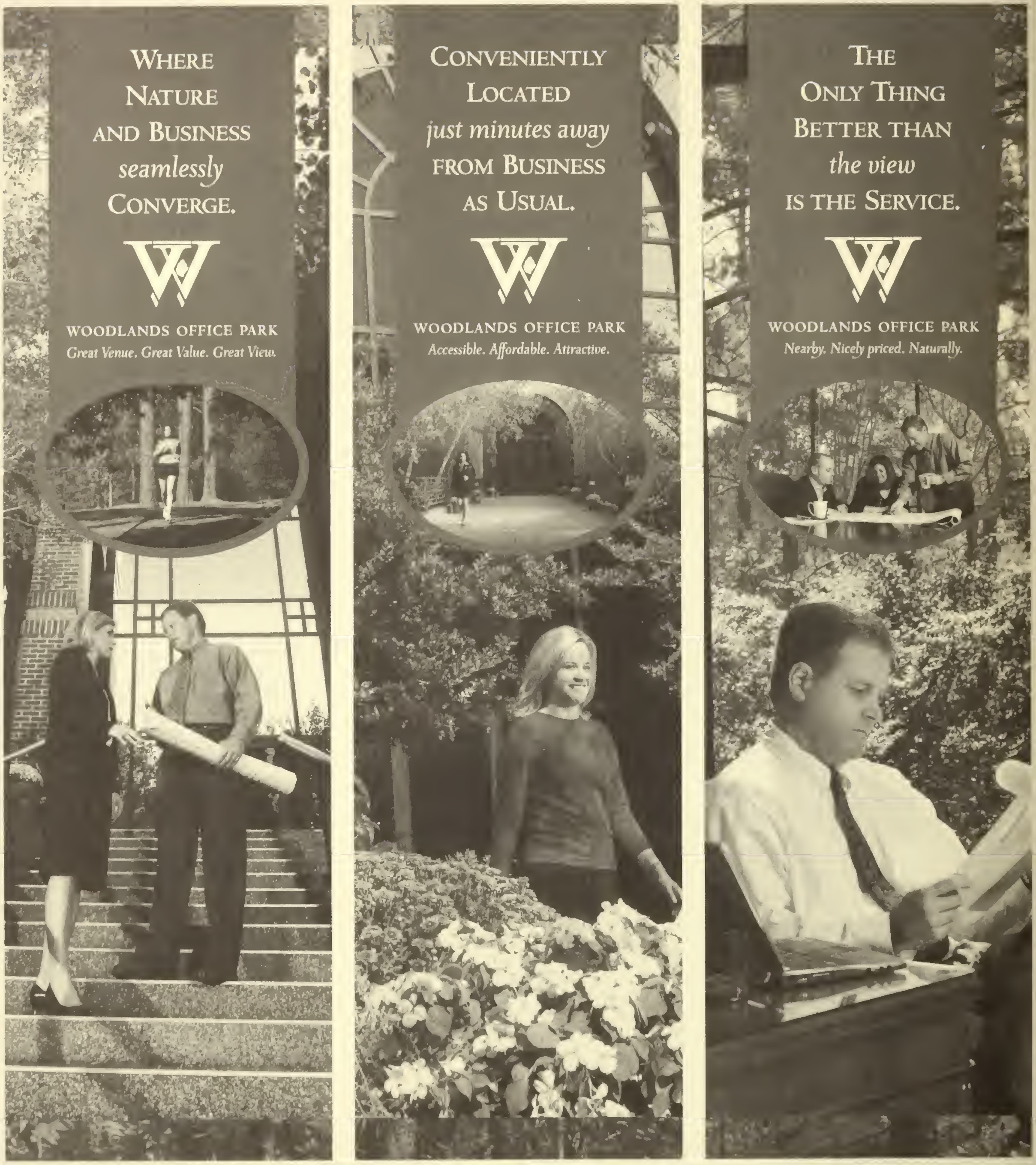
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